Supreme Court, U.S.
FILED

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OFFICE

No. _____

In the Supreme Court of the United States

KENNETH KING,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a failure to strictly comply with the mandates of a deeply rooted hearsay exception violates the right to confront witnesses.

2. Whether a failure to force a witness to appear (and testify) on behalf of a criminal defendant violates the right to compulsory process.

3. Whether a criminal defendant is afforded the counsel guaranteed by the Sixth Amendment when that counsel commits several serious mistakes during trial, which can be attributed to his inability to hear.

PARTIES TO THE PROCEEDING

Petitioner

Kenneth King is an individual with no corporate affiliations.

Respondent

The State of Ohio.

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Kenneth King respectfully petitions for writ of certiorari to review the judgment of the Supreme Court for the State of Ohio in this case.

OPINIONS BELOW

The Supreme Court for the State of Ohio did not accept jurisdiction in this case. (App., *infra* B.) Therefore, this decision is unreported. The decision of the Court of Appeals for the Ninth District for the State of Ohio, Medina County, is also unreported. (App., *infra* A.)

JURISDICTION

The Supreme Court for the State of Ohio entered its judgment refusing jurisdiction on October 4, 2000. (App., *infra* B.) A motion for reconsideration was denied on November 22, 2000. (App., *infra* C.) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 10, Article I of the Ohio Constitution is more detailed in the rights it sets forth:

> * * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the

> state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. * * *

Ohio Evid. R. 807 codifies when hearsay statements made by an abused child are admissible. The rule states, in relevant part:

> (A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:
>
> (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement.

In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

STATEMENT

A. Factual and Procedural History

This case arises out of the indictment by the Medina County, Ohio Grand Jury of King on one count of rape, in violation of Ohio Revised Code 2907.02 and one count of gross sexual imposition in violation of Ohio Revised Code 2907.05. He was indicted for committing these alleged crimes on a young girl, hereafter identified as Y.E., who was under the age of 13 at the time of the alleged abuse.

During trial, evidence of King's alleged abuse of another young child, D.A., was admitted over King's objection. Moreover,, the trial Court allowed the State to show a videotaped interview of Y.E. conducted by a social worker after the trial Court found that Y.E. was unable to testify at the trial--despite the fact that she did testify at the trial and without compliance with the mandates of Ohio Evid. R. 807.

There were further issues at trial concerning a young boy named, B.R. who appears to have been the actual alleged abuser. However, B.R. did not testify, and was not even compelled to take the stand. A guardian ad litem was appointed to represent B.R. The guardian ad litem refused to permit the young teen to waive his Federal Fifth Amendment rights.

Numerous issues were raised and preserved at trial. Other issues are before this Court pursuant to the ineffective assistance of counsel and plain error standards.

The jury convicted King of rape and gross sexual imposition. (App., *infra* A.) Thereafter, King was sentenced to nine years-despite the lack of any prior criminal record. An appeal to the Ninth District Court of Appeals followed. On May 31, 2000, the Ninth District Court of Appeals affirmed the trial Court's decision. (App., *infra* A.) The Supreme Court for the State of Ohio entered its judgment refusing jurisdiction on October 4, 2000. (App., *infra* B.) A motion for reconsideration was denied on November 22, 2000. (App., *infra* C.)

B. How the Federal Questions were Raised.

1. The violations of the right to confront accusers.

King's counsel objected to the admission of testimony for which there was not strict compliance with the mandates of Ohio Evid. R. 807.

> It is our understanding that the State intends to elicit testimony under State vs. Boston. (Trial transcript at 40.)

The trial court ruled as follows: "I am not going to do that, overruled." (Trial transcript at 40.)

King's counsel further objected: "Objection, Your Honor, State vs. Boston." (Trial transcript at 54.) The court overruled: "Okay, all right, overruled" (Trial transcript at 55.) With respect to the out-of-court statement (videotape) of Y.E., the trial court set forth its ruling at pages 395 through 399 of the trial transcript. (App., *infra* F.)

2. The violations of the Compulsory Process Clause

In pertinent part, the trial judge ruled (at page 721 of the trial transcript) as follows:

> I don't think the defense has any right, that I am aware of, you have the right to compel [B. R.] to come, which you have under the Ohio Constitution and also the Federal Constitution. [B. R.] has appeared in Court, he is outside.
>
> That is, the compulsory process has been satisfied.
>
> This Court finds to call him in front of a jury and have him take the Fifth Amendment is not part of the compulsory process clause, therefore for that reason he is not going to be called in front of the jury.

King's counsel indicated that: "* * * the defense does have evidence that would tend to show that Bobby Rowe committed this act." (Trial transcript at 708-709.)

King's trial counsel further stated that it was not his intention to ask whether B.R. had sexual contact with the victim, but:

> The purpose of bringing Bobby Rowe is to show two things, one, his presence with this child, and, two, that he was there quite often, for more than just swimming purposes, that he would mow the lawn, and what have you at the King residence. (Trial transcript at 716.)

3. King was not afforded the counsel guaranteed by the Sixth Amendment.

These issues were first raised on appeal to the Supreme Court for the State of Ohio. (App., *infra* D.)

REASONS FOR GRANTING THE PETITION

I. The Ohio courts violated King's right to confront his accusers.

King hereby requests that this Court address, once again, the delicate balance between a court's concern for the welfare of victims of child abuse and justice for those who are accused of such crime. King argues that the state courts' treatment of child witness evidence in this case does not comport with this Court's pronouncements.

The Ohio Supreme Court recently discussed the problems inherent in prosecutions involving crime victims of tender age.

> A very small child may not be competent to testify in open court. If such a child is abused,

the child may not be able to identify his or her attacker at a trial or to tell the trier of fact what happened. Unless some other form of evidence can be presented, those who abuse small children will be at liberty to do so with utter impunity. This need for admissible evidence to force those who abuse small children to face legal consequences of the abuse pushes courts to liberalize the rules under which evidence is admitted.

Liberalizing standards for admitting evidence in trials involving allegations of child abuse is not without its risks. Not every child who says he or she has been abused has in fact been abused. Sometimes a child can be a pawn in power games and rivalries between significant adults in the child's world. Sometimes the adults are willing to believe the worst about their adult adversaries and encourage, consciously or subconsciously, stories of abuse when abuse had not occurred. Sometimes the adults refuse to believe that someone they love could do such things to a child and divert the child's accusations toward someone they dislike.

The innocent desire of small children to please the adults they encounter makes the problem more complicated still. The child may be guided less by objective standards of truth than by the desire to say what a significant adult wants to hear. For the child, 'truth' can be what pleases the adult.

Still, the fact is undeniable that child abuse, sexual and otherwise, does occur and is a monumental problem. Some adults inflict incredible suffering on children for reasons that are difficult, if not impossible, for a healthy mind to fathom. Those who cruelly abuse children need to be punished for their cruelty and prevented from continuing or repeating their abuse. The innocent children need to be protected.

Perhaps the criminal justice system is not the best way to handle this important societal problem. However, for the foreseeable future, the criminal justice system will be a part of American society's answer to the problem, if only because substantial terms of incarceration can protect children from pedophiles.

The burden then falls upon the courts to devise rules of evidence for child abuse cases which maximize the likelihood of convictions for the guilty and minimize the likelihood of convicting the innocent, protecting and helping those children who truly have been abused while detecting those children whose stories of abuse are not true or accurate.

Ohio has taken a significant step in bearing this burden through the adoption of Evid. R. 807. * * * The rule is a conscientious attempt to balance the competing interests and increase the likelihood of just results.

State v. Storch, 66 Ohio St.3d 280, 284-286, 612 N.E.2d 305 (1993).

> The Sixth Amendment reads:
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 10, Article I of the Ohio Constitution is more detailed in the rights it sets forth:

> * * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused

> means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. * * *

Although the hearsay rule (along with its exceptions) and the Confrontation Clause protect similar values, this Honorable Court has repeatedly noted that the two are not coextensive. See California v. Green, 399 U.S. 149, 155-156, 90 S.Ct 1930, 1933-1934, 26 L.Ed.2d 489, 495 (1970); Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct 210, 218, 27 L.Ed.2d 213, 225-226 (1970). Thus, in some situations, even if evidence is admissible at trial as a hearsay exception, that evidence may nonetheless be inadmissible because it violates a defendant's right of confrontation. This Court has provided a framework in which to analyze how the Confrontation Clause affects a particular hearsay exception.

In Ohio v. Roberts, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597, 607 (1980), this Court set forth a general approach for accommodating the sometimes competing interests of the Confrontation Clause and the hearsay exceptions. The Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity." Id. In a holding which this Court substantially narrowed in later cases, see infra, Roberts stated that the prosecution must make a good faith effort to produce the declarant, or demonstrate the declarant's unavailability. Id. The declarant's statement should then be admitted "only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the

evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Id. at 66, 100 S.Ct. at 2539, 65 L.Ed.2d at 608.

In United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), this Court considered whether the Confrontation Clause requires the prosecution to show that a co-conspirator is unavailable to testify before the co-conspirator's statements may be admitted into evidence. The court held that the prosecution was not required to establish unavailability in that situation, and that this specific requirement of Roberts applies only where the prosecution seeks to admit testimony from a prior judicial proceeding instead of live testimony. Inadi, 475 U.S. at 392-394, 106 S.Ct. at 1124-1126, 89 L.Ed.2d at 396-398. The court stated that Roberts "cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." Id. at 394, 106 S.Ct. at 1125, 89 L.Ed.2d at 398. This Court also noted that the true mission of the Confrontation Clause is to "'advance "the accuracy of the truth-determining process in criminal trials."'" Id. at 396, 106 S.Ct at 1126, 89 L.Ed.2d at 399, quoting Tennessee v. Street, 471 U.S. 409, 415, 105 S.Ct. 2078, 2082, 85 L.Ed.2d 425, 432(1985).

This Court again considered the admissibility of statements made by a co-conspirator in Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). The hearsay exception for statements of a co-conspirator is firmly rooted. Id. at 183, 107 S.Ct. at 2782, 97 L.Ed.2d at 157. For that reason, this Court held that a co-conspirator's statements carry with them sufficient "indicia of reliability" and therefore a court need not conduct an independent inquiry into the reliability of the statements. Id.

More recently, in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), this Court considered whether a trial court properly admitted a hearsay statement made by a child pursuant to Idaho's "residual hearsay exception." "This Court noted that "Idaho's residual hearsay exception, * * * under which the challenged statements were admitted, * * * is **not** a firmly rooted hearsay exception for Confrontation Clause purposes." (Emphasis added.) Id. at 817, 110 S.Ct. at 3147, 111 L.Ed.2d at 653. For that reason, Roberts requires that the hearsay testimony be inadmissible unless "particularized guarantees of trustworthiness" are present. This Court did not believe that the child's statement was particularly trustworthy, and therefore found that the state had failed to carry its burden of demonstrating "particularized guarantees of trustworthiness" in the totality of the circumstances.

The Wright court made clear that its analysis would have been completely different if the hearsay exception had been "firmly rooted": "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Id. at 817, 110 S.Ct. at 3147, 111 L.Ed.2d at 653.

In White v. Illinois, supra, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), this Court again considered the use of hearsay statements made by a child against a defendant being prosecuted for sexual assault of the child. The trial court allowed the hearsay statements into evidence as spontaneous declarations and also as statements made in the course of medical treatment. The appellate court affirmed that decision, finding that the accused's right of confrontation was not denied. Although the four-year-old girl did not testify at

trial, no specific finding of unavailability was made by the trial court.

The White court began its analysis by limiting the application of the unavailability requirement of Roberts, stating that "Roberts stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." White, supra, 502 U.S. at 354, 112 S.Ct. at 741, 116 L.Ed.2d at 858. Thus, unavailability of the declarant need not be demonstrated when a hearsay statement is admitted pursuant to an Ohio Evid.R. 803 exception.

Ultimately, this Court held that "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." Id. at 356, 112 S.Ct. at 743, 116 L.Ed.2d at 859. This Court noted that such firmly rooted hearsay exceptions as spontaneous declarations and statements made in the course of receiving medical care are recognized as normally occurring in contexts that provide substantial guarantees of trustworthiness. Id. at 355, 112 S.Ct. at 742, 116 L.Ed.2d at 859. For that reason, the Confrontation Clause is automatically satisfied by a hearsay exception which is firmly rooted - the presence of "particularized guarantees of trustworthiness" need not be shown. Id. at 355, 112 S.Ct. at 742-743, 116 L.Ed.2d at 859-860.

Thus, this Court held that, even in cases involving hearsay statements of children in the prosecution of the children's alleged abusers, if the hearsay statement at issue falls within a firmly rooted hearsay exception, its admission does not violate the defendant's right of confrontation. In

such a case, the prosecution is not required to demonstrate the unavailability of the declarant.

On the other hand, if the hearsay statement at issue does not fall within a firmly rooted hearsay exception, further inquiry is required. Hearsay not falling within a firmly rooted exception must be excluded unless "particularized guarantees of trustworthiness" can be shown. Wright, supra, 497 U.S. at 818, 110 S.Ct. at 3147, 111 L.Ed.2d at 653.

Admitting the videotaped interview of Y.E. without making the necessary Ohio Evidence Rule 807 findings, including that of convening a hearing at least ten days prior to the trial, violated King's rights to confront his accuser pursuant to the United States (and Ohio) Constitution. This is so since, absent strict adherence to the procedural and other mandates of Ohio Evid. R. 807, the hearsay statements of the young child do not fall within a firmly rooted hearsay exception.

Ohio Evid. R. 807 codifies when hearsay statements made by an abused child are admissible. The rule states, in relevant part:

> (A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 **if all of the following apply:**

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) **At least ten days before the trial** or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) **The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter** of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify. (Emphasis added.)

By its own terms, Evid. R. 807 provides what a trial court must find on the record. First, a trial court must find "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of

> trustworthiness * * *." Evid. R. 807 (A)(1). Second, a trial court must find that "[t]he child's testimony is not reasonably obtainable by the proponent of the statement." Evid. R. 807 (A)(2). Third, a trial court must find "independent proof of the sexual act or act of physical violence." Evid. R. 807 (A)(3). Finally, a trial court must find that the proponent of the statement fulfilled the notice requirements under Evid. R. 807 (A)(4). Evid. R. 807 (C) also requires a trial court to make findings of fact to support each of the general findings.

State v. Said, 71 Ohio St.3d 473, 477, 644 N.E.2d 337, 341 (1994).

"Findings in the form of skeletal conclusions are inadequate under Evid. R. 807." Id. at 478.

The Twelfth District Court of Appeals for the State of Ohio, while not considering admission of such testimony under Ohio Evid. R. 807, stated in a footnote that such evidence could not have been admitted in that case since no ten-day written notice had been provided. Moman v. Smith (Oct.14, 1996), Clermont App. No. CA 96-05-047, unreported. (App., *infra* E.) In that case, the court went on to state that the party seeking to have the evidence admitted could not have satisfied all the requirements of the rule on the date of the hearing. That is because the ten-day notice had not been provided.

In the instant matter, the introduction of Y.E.'s videotaped and other statements violated Evid. R. 807 and consequently the Confrontation Clause of the United States

(and Ohio) Constitution. The prerequisites of Evid. R. 807 are mandatory. Said, supra. The rule contemplates that a pretrial hearing will be conducted at which time the ability of the child to testify should be addressed and an initial determination as to the admissibility of the child's statement should be made. State v. Storch, 66 Ohio St. 3d 280, 612 N.E. 2d 305, paragraph 2 of the syllabus (1993). None was held here. Likewise, Y.E. did not refuse to testify. She just did not testify as contemplated by the prosecutor. In fact, on the stand, she denied the alleged incident.

The state courts violated the Confrontation Clause when they permitted the parents of the alleged abused children to testify.

The state court treatment of King violated this Court's pronouncements in Wright and White, and consequently, King's right to confront witnesses.

II. The Ohio courts violated Kings' rights pursuant to the Compulsory Process Clause

A trial court errs and abuses its discretion when it excludes a person who has previously asserted his Fifth Amendment privilege against self-incrimination from appearing as a witness on behalf of a criminal defendant.

The trial court was advised that if B.R. were called to testify, that he would plead the Fifth Amendment. His mother, though, indicated that she wanted him to testify fully and that she would waive his Fifth Amendment privileges. Thereafter, a guardian ad litem was appointed to represent B.R. The guardian ad litem invoked B.R.'s Fifth Amendment rights in chambers-out of view of the jury. The trial court did not compel B.R. to take the stand because such a

procedure, according to the trial court, would permit the jury to make impermissible inferences–such as B.R. committed the offense(s) against Y.E.

The actions of the trial and appellate courts violated King's rights pursuant to the Compulsory Process Clause and also violated his rights to confront witnesses.

The right of the accused in a criminal trial to obtain or call witnesses in his or her favor is fundamental and essential to a fair trial. It is basic to due process of law, and when the Defendant is deprived of this right, the trial is haunted by the specter of unfairness and the appearance thereof. Littlejohn v. U.S., 705 A. 2d 1077 (D.C. 1997). Under the Federal Constitution, one accused of a crime has the right to have compulsory process to procure the presence of witnesses. U.S. Const. Amend. VI. Moreover, the right of the accused to have compulsory process for obtaining witnesses on his or her behalf is guaranteed by the Sixth Amendment and is so fundamental and essential to a fair trial that it is incorporated into the due process clause of the Fourteenth Amendment and is applicable to state trials. Washington vs. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967). Likewise, the Sixth Amendment guarantees the right to confront witnesses.

As stated in State v. Snyder, 244 Iowa 1244, 1248, 59 N.W. 2d 223 (1953):

> The general rule is . . . that 'although a witness cannot be compelled to give incriminating testimony, he must if properly summoned appear and be sworn.' His privilege is available only as a witness and cannot be extended so as to excuse him from appearing. If the witness himself cannot escape being

> sworn by claiming in advance that he will refuse to testify, certainly the defendant against whom such witness is offered, cannot claim greater rights.' See, also, 8 Wigmore on Evidence, 402, Section 2268.

"The possibility that a witness may claim the privilege does not prohibit [counsel] from asking questions." Snyder, supra at 1248, 59 N.W. 2d at 226. A witness, even though he has previously indicated that he will refuse to testify on the ground that to do so would incriminate him, may be called as a witness.

A trial court is well within its discretion to limit repeated questioning which is solely sought to elicit the repeated assertion of a person's Fifth Amendment rights. However, that court may not prevent the witness form appearing on behalf of the defendant. State v. Dinsio, 176 Ohio St. 460, 466, 200 N.E. 2d 467, 471 (1964).

The instant case is similar to that of Columbus v. Cooper, 49 Ohio St. 3d 42, 550 N.E.2d 937 (1990). In that case, the defendant sought to call the witness not to have him assert his Fifth Amendment rights in front of the jury, but to allow the jury an opportunity to view the witness. It is the contention of King that B.R. better fits the description given by the alleged victims, and consequently, he was the one who committed the crime. In fact, there was corroborating evidence that Y.E. thought that B.R.'s name was Kenny. Thus, as in Cooper, the accused's intent in calling the witness included "afford[ing] the jury the opportunity to compare the physical appearance of [the accused] and [the witness] but not to get before the jury [the witness's] assertion of his Fifth Amendment rights." Cooper, supra at 47, 550 N.E. 2d at 941.

The second issue involves who invoked the Fifth Amendment privilege. B.R.'s mother wanted him to testify. The guardian ad litem did not.

As his mother and legal guardian, she had the unfettered right to invoke or waive any and all rights which her son may have pursuant to the United States (and/or Ohio) Constitution. There was no finding or showing that B.R.'s mother was incompetent or otherwise unable to properly care for him. It was error of the trial court to permit a guardian ad litem to be appointed and to permit that guardian ad litem to invoke the rights of the witness.

III. King was not afforded the counsel guaranteed by the Sixth Amendment.

One of the bulwarks of the American Justice System is the provision of effective counsel to a criminal defendant.

To prevail on a claim of ineffective assistance of counsel, the Defendant must show (1) that counsel performed so deficiently that they were not functioning as the "counsel" guaranteed by the Sixth Amendment and (2) that counsel's errors were prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct.2052, 2064, 80 L.Ed. 2d 674, 693 (1984). Performance is "deficient" when it falls below an objective standard of reasonable representation. Id. at 690-691, 104 S.Ct. at 2066, 80 L.Ed. 2d at 695-696. "Prejudice" means a reasonable probability that, but for counsel's errors, the result of the proceeding would undermine [the court's] confidence in the outcome." Id. at 694, 104 S.Ct. at 2068, 80 L.Ed. 2d at 698. See, generally, State v. Bradley, 42 Ohio St. 3d 136, 142-143, 538 N.E. 2d 373, 379-781, and paragraphs two and three of the syllabus (1989).

The Defendant need not show that, but for the error, the trial would have come out differently. Strickland, supra at 693-694, 104 S.Ct. at 2068, L.Ed. 2d at 697.

A. Counsel is ineffective in not objecting to the inclusion of testimony from a therapist for a minor child without first ascertaining whether the minor child was unavailable or whether there was any other hearsay exception available.

Here, counsel was ineffective in not objecting to the inclusion of testimony from a therapist (Dr. LeSure) for the two minor children, Y.E and D.A., without first ascertaining whether Y.E. and D.A. were unavailable to testify or whether there was any other hearsay exception which applied.

Dr. LeSure took the stand as the first prosecution witness. She testified, over objection, that Y.E. had been sexually assaulted by King. She also testified concerning alleged details given by the child. Although there was an objection to the testimony, counsel did not raise a specific objection as to the availability or unavailability of the child. As this was the first witness called, and as there was no finding (at that time) that the child was unavailable, Dr. LeSure could not present her testimony.

D.A. did not even appear at trial–thus she could not be found to be unavailable.

Had a proper objection been made at that time, Dr. LeSure could not have provided testimony regarding what the children told her. And, consequently, there would have been no foundation laid for Dr. LeSure's opinions. Instead, the jury was permitted to hear a full rendition of the testimony

which the prosecution intended to present of Y.E. and of the allegations of D.A. Additionally, the inclusion of such constitutes plain error, and as such is reversible.

B. Counsel is ineffective when he failed to specifically object to the failure of the trial court to convene the Ohio Evidence Rule 807 hearing at least ten days prior to the trial.

No ten-day written notice was given as mandated in Ohio Evid. R. 807 (B)(4), and there was no objection to the skeletal findings. Not having objected to these mandates, counsel failed to protect King's constitutional rights to confront his accusers.

Likewise, these errors of the court were plain, and as such reversal is mandated.

C. Counsel is ineffective in trying a case when he could not hear.

Throughout the trial, counsel for King indicated that he was very hard of hearing, and that he could not hear the testimony of certain witnesses. In fact, following the direct examination of Colleen Spangle, Y.E.'s mother, trial counsel indicated that he had not heard hardly any of the direct testimony. Perhaps, this is why he did not object in a timely manner to the inclusion of clearly hearsay testimony without the State laying any foundation.

Clearly, the fact that an attorney has a problem with hearing does not disqualify the attorney from practicing law. However, where trial counsel has indicated that he could not hear any of the testimony of one of the key witnesses, and he

complained incessantly of not being able to hear, such constitutes ineffective assistance of counsel.

D. Counsel is ineffective when he fails to raise at the appellate court level the error of the trial court in admitting the alleged statement of a minor child pursuant to the Excited Utterance Rule.

Under Ohio law, an excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Ohio Evid. R. 803(2); State v. Street, 122 Ohio App. 3d 79, 86, ___ N.E. 2d ___ (1997). A child's statements are not excited utterances and are not admissible when made in response to closed-end questions. State v. Ulis, 91 Ohio App. 3d 656, 663, 633 N.E. 2d 562, 567 (1993).

In the instant matter, the testimony is quite clear from D.A.'s mother that D.A. only "acted surprised" and indicated that King had sexually abused her after she was directly asked if King sexually abused her. This is a very leading question. Additionally, the evidence was that this alleged abuse happened some 18 months or more prior to D.A. telling her mother of same. D.A. could not have still been under the stress of the alleged event.

In the instant matter, it was plain error to admit this highly inflammatory and prejudicial statement without first demanding that the child appear before the Court. In essence, King was convicted without any testimony from his accusers. No cross-examination was afforded to him. Consequently, his rights pursuant to the Ohio and the U.S. Constitutions were clearly violated.

By not raising the above objections in a timely manner, and in not being able to hear the proceedings, counsel for King did not act as the trial counsel guaranteed by the Sixth Amendment. Consequently, for all practical purposes, King was tried and convicted–without having the aid of counsel.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

[Filed May 31, 2000]

C.A. NO. 2963-M

STATE OF OHIO
COUNTY OF MEDINA

STATE OF OHIO	)
Appellee	)
	)
v.	)
	)
KENNETH D. KING	)
Appellant.	)
	)

APPEAL FROM JUDGMENT ENTERED
IN THE COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE NO. 97-CR-0368

DECISION AND JOURNAL ENTRY

Dated: May 31, 2000

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

Appellant, Kenneth King, appeals his conviction in the Medina County Court of Common Pleas. We affirm.

I.

On November 20, 1997, the Medina County Grand Jury indicted Mr. King on one count of rape, in violation of R.C. 2907.02, and one count of gross sexual imposition, in violation of R.C. 2907.05. He was indicted for committing those crimes on a young girl named "Y.E." who was under thirteen years of age at the time of the abuse.

Mr. King was separately indicted by the Medina County Grand Jury on January 5, 1998, for rape and gross sexual imposition of another young girl by the name of "D.A." The case involving D.A. was resolved by Mr. King pleading guilty to gross sexual imposition, in violation of R.C. 2907.05(A)(4), and sexual battery, in violation of R.C. 2907.03(A)(5), on February 3, 1999, and is not currently before this court.

A trial was held concerning the abuse of Y.E., commencing on August 12, 1998, in which evidence of Mr. King's abuse of D.A. was admitted over Mr. King's objection. The trial court also allowed the state to show a videotaped interview of Y.E. conducted by Joan Selby because Y.E. was unable to testify at trial that Mr. King

committed the crime charged. Mr. King sought, by way of defense, to have a young boy named "B.R." testify that he, rather than Mr. King, committed the crimes. However, B.R. refused to testify based upon his Fifth Amendment rights. Mr. King then sought to have Dr. Ann Carden, B.R.'s psychologist, testify that B.R. had admitted to Dr. Carden doing the acts for which Mr. King was being tried. However, although B.R.'s mother had waived the psychologist-patient privilege at one point, and hence, Dr. Carden had disclosed B.R.'s statements to Mr. King's defense counsel, the trial court allowed B.R. to assert the psychologist-patient privilege and ruled that Dr. Carden could not testify. Mr. King also sought to call Dr. Sandra McPherson as an expert to testify regarding the interview procedures used on D.A. The trial court ruled that, as her testimony was offered on surrebuttal, it was beyond the scope of the state's evidence on rebuttal and was inadmissible. The state also presented DNA evidence from samples of semen taken from Y.E.'s underwear that were shown to match Mr. King's DNA. In a verdict journalized on August 25, 1998, the jury convicted Mr. King of rape and gross sexual imposition. Mr. King was sentenced accordingly. This appeal followed.

II.

Mr. King asserts four assignments of error. We will address each in due course, consolidating the second and fourth to facilitate review.

A.

First Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY VIOLATING APPELLANT' S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION BY IMPROPERLY ADMITTING HEARSAY TESTIMONY UNDER EVID.R. 807.

Mr. King argues that by admitting the videotaped interview of Y.E. without making the necessary findings under Evid. R. 807, the trial court violated Evid. R. 807 and his right to confront his accuser under the Ohio and United States Constitutions. We disagree.

"'The trial court has broad discretion in the admission * * * of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, [an appellate] court should be slow to interfere.'" (First alteration in original.) *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, quoting *State v. Hymore* (1967), 9 Ohio St.2d 122, 128. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.* Moreover, a new

trial should not be granted unless the accused was prejudiced or may have been prejudiced by the evidence improperly admitted. R.C. 2945.83(C).

Evid. R. 807 accords with the Confrontation Clause of the Sixth Amendment to the United States Constitution. *State v. Storch* (1993), 66 Ohio St.3d 280, paragraph one of the syllabus.

Evid. R. 807 codifies when hearsay statements made by an abused child are admissible. Evid. R. 807 states, in relevant part:

> (A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:
>
> (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its

determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

> (B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:
>
> (1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.
>
> * * *

In *State v. Said* (1994), 71 Ohio St.3d 473, 477, the Ohio Supreme Court interpreted Evid. R. 807, stating that

> [b]y its own terms, Evid. R. 807 provides what a trial court must find on the record. First, a trial court must find "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness * * *." Evid. R. 807(A)(1). Second, a trial court must find that "[t]he child's testimony is not reasonably obtainable by the proponent of the statement." Evid. R. 807(A)(2). Third, a trial court must find "independent proof of the sexual act or act of physical violence." Evid. R. 807(A)(3). Finally, a trial court must find that the proponent of the statement fulfilled the notice requirements under Evid. R. 807(A)(4).

> Evid. R. 807(C) also requires a trial court to make findings of fact to support each of the general findings.

However, "[f]indings in the form of skeletal conclusions are inadequate under Evid. R. 807[.]" *Said,* 71 Ohio St.3d at 478.

In the instant case, the thai court concluded that the statements made by Y.E. were at least as trustworthy as the exceptions to the hearsay rule under Evid. R. 803 and 804. The trial court based its conclusion on Y.E.'s testimony, the statements Y.E. made on the videotape, and the testimony of Officer Warren Walter, who filmed Joan Selby's interview with Y.E. The testimony in this case showed that there was little lapse of time between the incident and Y.E.'s statements concerning the abuse during the videotaped interview with Joan Selby. Moreover, among other things, Y.E.'s statements showed a knowledge beyond that which would be expected of a child of her age and a lack of motive to fabricate. Furthermore, Mr. King did not raise a specific objection to the trail court's findings under Evid. R. 807(A)(1). Unlike the trial court in *Said,* the trial court below based its decision on the totality of the testimony that had been adduced up to that point in the trial. Hence, based upon this record, we cannot conclude that the trial court abused its discretion by finding that the requirements of Evid. R. 807(A)(1) were fulfilled.[1]

---

[1] Mr. King did not challenge the constitutionality of Evid. R. 807 or the trial court's application of Evid. R. 807 in the trial court. Hence, Mr. King's assignment of error as it pertains to the Confrontation Clause of the Sixth Amendment to the United States Constitution was not passed upon by the trial court and is not properly before this court.

Mr. King also argues that the trial court erred by failing to require the state to give ten days notice to him prior to trial pursuant to Evid. R. 807(A)(4). The state had planned to call Y.E. in person, and in fact did so. Y.E., however, was unable to testify about the incident involving Mr. King when she was called to the witness stand. At that point, the state sought to introduce the videotape of Y.E.'s statements to Joan Selby. Mr. King did not move for a continuance, or aver that he needed additional time to prepare to rebut the videotaped testimony and did in fact rebut the testimony in his own case in chief. Hence, we conclude that the trial court did not err to Mr. King's prejudice by admitting the videotaped testimony of Y.E. without the state having given Mr. King ten days notice of its intent to utilize such evidence prior to trial. Mr. King's first assignment of error is overruled.

B.

Second Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT THE OPPORTUNITY TO CALL DR. ANN CARDEN TO DELIVER EXCULPATORY EVIDENCE AND TESTIMONY WHICH SUPPORTED THAT A JUVENILE NAMED "B.R." COMMITTED THE ALLEGED OFFENSE(S) AND WAS WITH THE ALLEGED VICTIM THE DAY BEFORE AND DAY OF THE ALLEGED OFFENSE(S).

Fourth Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT THE OPPORTUNITY TO CALL DR. SANDRA McPHERSON TO DELIVER EVIDENCE REGARDING THE IMPROPER INVESTIGATORY METHODS UTILIZED BY THE STATE'S EXPERT, DR. LESURE, AND REGARDING THE SUBSTANTIAL RISK OF MIS-FOCUSED OR MISTAKEN IDENTITY INHERENT WITH DR. LESURE'S INTERVIEW PROTOCOL.

Mr. King argues that the trial court erred when it allowed B.R. to invoke the psychologist-patient privilege through a court appointed guardian *ad litem* after his mother had waived the privilege. Furthermore, Mr. King argues that the trial court erred when it ruled that Dr. McPherson, his expert on interrogation protocol in abused children, could not testify on surrebuttal. We disagree.

"The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

B.R.'s mother admitted to the trial court that a conflict of interest might exist between her interests and those of her son. At that point, the trial court indicated that it might be appropriate for a guardian *ad litem* to be appointed to protect B.R.'s interests, as is required by R.C. 2151.28 l(A)(2) when a conflict of interest is present. The Medina County Court of Common Pleas, Juvenile Division, appointed B.R.'s attorney as his guardian *ad litem,* pursuant to R.C. 2151.28 l(A)(2), due to the admitted conflict of interest with his mother. B.R.'s guardian *ad litem* then asserted the psychologist-patient privilege before the trial court, pursuant to R.C. 2317.02(B)(1). Hence, we cannot conclude that the trial court abused its discretion by excluding Dr. Carden's testimony based upon B.R.'s assertion of the psychologist-patient privilege or erred in accepting B.R.'s guardian *ad litem's* assertion of the privilege. See *In re Guardianship of Escola* (1987), 41 Ohio App.3d 42, 46.

Mr. King also asserts that the trial court erred when it prevented him from presenting the testimony of Dr. McPherson on surrebuttal. As previously noted, the admission and exclusion of relevant evidence is within the discretion of the trial court. Moreover, "[t]he denial of surrebuttal testimony by a criminal defendant lies solely within the discretion of the trial court [and a] court does not, *ipso facto,* abuse its discretion in denying a criminal defendant the opportunity to present surrebuttal testimony." (Citation omitted.) *State v. Spirko* (1991), 59 Ohio St.3d 1, 28. After reviewing the record, we cannot conclude that the trial court acted with passion, prejudice or the like in excluding the testimony of Dr. McPherson. Moreover, even if the trial court had erred in excluding Dr. McPherson's testimony on surrebuttal, Mr. King was allowed to present other testimony

on surrebuttal, and based on the weight of the other evidence produced at trial, any error is harmless. Mr. King's second and fourth assignments of error are overruled.

C.

Third Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED THE STATE OF OHIO TO INTRODUCE EVID.R. 404(B) PRIOR BAD ACTS EVIDENCE AGAINST THE APPELLANT DESPITE A FAILURE OF THE STATE TO SUBSTANTIALLY DEMONSTRATE THAT THE APPELLANT COMMITTED THE ALLEGED PRIOR BAD ACT AND A LACK OF EVIDENCE DEMONSTRATING A DEFINITIVE IDIOSYNCRATIC PATTERN OF CONDUCT BETWEEN THE ALLEGED ACTS.

Mr. King asserts that the trial court erred by admitting testimony concerning his sexual abuse of D.A. because there was not substantial evidence that he committed the acts; moreover, the acts were not sufficiently connected to the crime charged. We disagree.

As noted above, a trial court's decision regarding the admission of evidence is reviewed under the abuse of discretion standard.

Generally, evidence of prior criminal acts, wholly independent of the crime for which defendant is on trial, is inadmissible. *State v. Thompson* (1981), 66 Ohio St.2d 496, 497. R.C. 2945.59 codifies the exceptions to this rule, providing:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Evid. R. 404(B) states that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evid. R. 404(B) is in accord with R.C. 2945.59. *State v. Broom* (1988), 40 Ohio St.3d 277, 281. "The issue of

identity, although not listed in the statute, has been held to be included within the concept of scheme, plan, or system." *Id.* Hence, it is necessary to determine whether any of the matters enumerated in R.C. 2945.59 were relevant at trial and, if so, whether the testimony that the prosecution elicited regarding other acts of the defendant tended to prove the relevant enumerated matter. *State v. Curry* (1975), 43 Ohio St.2d 66, 70.

"Because R.C. 2945.59 and Evid. R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *Broom,* 40 Ohio St.3d at paragraph one of the syllabus. Moreover, evidence of other acts by a defendant is only admissible when it tends to show one of the matters enumerated in the statute and only when the evidence offered is relevant to prove that the defendant is guilty of the offense in question. *State v. Burson* (1974), 38 Ohio St.2d 157, 158. Finally, the state must "offer[] substantial proof that the alleged similar act was committed by the defendant." *State v. Carter* (1971), 26 Ohio St.2d 79, paragraph two of the syllabus.

Mr. King asserted as part of his defense that B.R. had committed the crimes that he was accused of, putting identity at issue. Hence, as the alleged abuse of D.A. was close in time, as well as similar in execution, to the abuse of Y.E., we conclude that the trial court did not abuse its discretion by admitting testimony concerning the alleged abuse of D.A. as it was relevant evidence of Mr. King's identity in this case.

Mr. King also asserts that the trial court erred in concluding that substantial evidence was produced by the state showing that he had committed the acts on D.A. After reviewing the testimony before the trial court which implicated Mr. King in the abuse of D.A., we conclude that the trial court did not err in concluding that substantial evidence existed showing that Mr. King committed the acts upon D.A. Mr. King's third assignment of error is overruled.

III.

Mr. King's four assignments of error are overruled. The verdict of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellant.

Exceptions.

/s/_____
WILLIAM G. BATCHELDER
FOR THE COURT

REECE, J.
CONCURS

CARR, P.J.
CONCURS IN JUDGMENT ONLY

(Reece, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Section 6(C), Article IV, Constitution.)

APPENDIX B

THE SUPREME COURT OF OHIO

[Filed October 4, 2000]

Case No. 00-1269

STATE OF OHIO, *Appellee*,	)
v.	)
KENNETH D. KING, *Appellant*.	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Maistros & Loepp LTD.

(Medina County Court of Appeals; No. 2963M)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX C

THE SUPREME COURT OF OHIO

[Filed November 22, 2000]

Case No. 00-1269

STATE OF OHIO,
Appellee,

v.

KENNETH D. KING,
Appellant.

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 2963M)

/s/_____
Thomas J. Moyer
Chief Justice

APPENDIX D

IN THE SUPREME COURT OF OHIO

[Filed July 14, 2000]

Case No. 00-1269

[Court of Appeals Case No. 2963-M]

STATE OF OHIO *Appellee*	)
v.	)
KENNETH D. KING *Appellant.*	)

On Appeal from the Medina County Court of Appeals, Ninth Appellate District

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT KENNETH KING

* * * *

. . . physical appearance of [the accused] and [the witness] but not to get before the jury [the witness's] assertion of his Fifth Amendment rights." Cooper at 47.

The second issue involves who invoked the Fifth Amendment privilege. B.R.'s mother wanted him to testify. The guardian ad litem did not.

As his mother and legal guardian, Carolyn Knight had the unfettered right to invoke or waive any and all rights which her son may have pursuant to the United States and/or Ohio State Constitutions. There was no finding or showing that B.R.'s mother was incompetent or otherwise unable to properly care for him. It was error of the trial court to permit a guardian ad litem to be appointed and to permit that guardian ad litem to invoke the rights of the witness.

Proposition of Law No. III: Counsel is ineffective when:

A. Counsel is ineffective in not objecting to the inclusion of testimony from a therapist for a minor child without first ascertaining whether the minor child was unavailable or whether there was any other hearsay exception available.

B. Counsel is ineffective when he failed to specifically object to the failure of the trial court to convene the Evidence Rule 807 hearing at least ten days prior to the trial.

C. Counsel is ineffective in trying case when he could not hear.

D. Counsel is ineffective when he fails to raise at the appellate court level the error of the trial court in admitting the alleged statement of a minor child pursuant to the Excited Utterance Rule.

Additionally, such constitute plain errors.

As an introduction to this portion of the brief, these issues are raised here for the first time, since trial counsel also handled the initial appeal. As such, trial counsel did not raise their own errors before the Ninth District Court of Appeal.

A. Counsel is ineffective in not objecting to the inclusion of testimony from a therapist for a minor child without first ascertaining whether the minor child was unavailable or whether there was any other hearsay exception available.

> The Defendant need not show that, but for the [counsel's] error, the trial would have come out differently.

State v White (1999), 85 Ohio St. 3d 433,450; citing Strickland v. Washington (1984), 466 U.S. 668, 693-694.

Here, counsel was ineffective in not objecting to the inclusion of testimony from a therapist (Dr. LeSure) for the

two minor children, Y.E and D.A., without first ascertaining whether Y.E. and D.A. were unavailable to testify or whether there was any other hearsay exception which applied.

Dr. LeSure took the stand as the first prosecution witness. She testified, over objection, that Y.E. had been sexually assaulted by King. She also testified concerning alleged details given by the child. Although there was an objection to the testimony, counsel did not raise a specific objection as to the availability or unavailability of the child. As this was the first witness called, and as there was no finding (at that time) that the child was unavailable, Dr. LeSure could not present her testimony.

D.A. did not even appear at trial-thus she could not be found to be unavailable.

Had a proper objection been made at that time, Dr. LeSure could not have provided testimony regarding what the children told her. And, consequently, there would have been no foundation laid for Dr. LeSure's opinions. Instead, the jury was permitted to hear a full rendition of the testimony which the prosecution intended to present of Y.E. and of the allegations of D.A. Additionally, the inclusion of such constitutes plain error, and as such is reversible.

B. Counsel is ineffective when he failed to specifically object to the failure of the trial court to convene the Evidence Rule 807 hearing at least ten days prior to the trial.

No ten-day written notice was given as mandated in Evid. R. 807 (B)(4), and there was no objection to the skeletal findings. Not having objected to these mandates, counsel failed to protect King's constitutional rights to confront his accusers.

Likewise, these errors of the court were plain, and as such reversal is mandated.

C. Counsel is ineffective in trying a case when he could not hear.

Throughout the trial, counsel for King indicated that he was very hard of hearing, and that he could not hear the testimony of certain witnesses. In fact, following the direct examination of Colleen Spangle, Y.E.'s mother, trial counsel indicated that he had not heard hardly any of the direct testimony. Perhaps, this is why he did not object in a timely manner to the inclusion of clearly hearsay testimoruny without the State laying any foundation.

Clearly, the fact that an attorney has a problem with hearing does not disqualify the attorney from practicing law. However, where trial counsel has indicated that he could not hear any of the testimony of one of the key witnesses, and he complained incessantly of about not being able to hear, such constitutes ineffective assistance of counsel.

D. Counsel is ineffective then he fails to raise at the appellate court level the error of the trial court in admitting the alleged statement or a minor child pursuant to the Excited Utterance Rule.

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. Evid. R. 803(2); State v. Street (1997), 122 Ohio App. 3d 79, 86. A child's statements are not excited utterances and are not admissible when made in response to closed-end questions. State v. Ulis (1993), 91 Ohio App. 3d, 656, 663, reversed on other grounds (1992), 65 Ohio St. 3d 83.

In the instant matter, the testimony is quite clear from D.A.'s mother that D.A. only "acted surprised" and indicated that King had sexually abused her after she was directly asked if King sexually abused her. This is a very leading question. Additionally, the evidence was that this alleged abuse happened some 18 months or more prior to D.A. her telling her mother of same. D.A. could not have still been under the stress of the alleged event.

In the instant matter, it was plain error to admit this highly inflammatory and prejudicial statement without first demanding that the child appear before the Court. In essence, King was convicted without any testimony from his accusers. No cross-examination was afforded to him. Consequently, his rights pursuant to the Ohio and the U.S. Constitutions were clearly violated.

Proposition of Law No. IV: A trial court abuses its discretion when it denies a criminal defendant the opportunity to call a psychiatrist or physician to testify as to incriminating statements made by a third party.

The trial court denied King the right to call Dr. Ann Carden to present evidence which tended to show that B.R. committed the alleged offense and to present evidence which placed B.R. with the alleged victim the day before and the day of the alleged offense.

Prior to King's indictment, Dr. Carden counseled B.R. for inappropriate sexual, physical and/or threatening behavior towards his mother, teachers and towards other children. B.R. was physically and sexually abused as a young child. He had engaged in a series of inappropriate conduct with other children including attempting anal intercourse with a three year old boy, pulling clothing off of other children, inappropriate grabbing and touching of . . .

APPENDIX E

12th DISTRICT COURT OF APPEALS OF OHIO
CLERMONT COUNTY

[Decided on October 14, 1996]

CASE NO. CA96-05-047

BOBBY LEE MOMAN,
Petitioner-Appellant,

v.

KAREN SMITH, et al.,
Respondents-Appellees.

Judy Alves, 324 Reading Road, Cincinnati, Ohio 45202, for petitioner-appellant

Karen Smith, 718 Washington Street, New Richmond, Ohio 45157, pro se, and Clint Howard, 718 Washington Street, New Richmond, Ohio 45157, pro se

OPINION

YOUNG, J.

Petitioner-appellant, Bobby Lee Moman, appeals the Clermont County Domestic Relations Court decision

dismissing his R.C. 3113.31 petition for a protection order based upon allegations of domestic violence. Moman sets forth the following two assignments of error:

Assignment of Error No. 1:

> THE TRIAL COURT ERRED IN ARBITRARILY EXCLUDING CHILD HEARSAY EVIDENCE DURING TEMPORARY PROTECTIVE CUSTODY HEARING.

Assignment of Error No. 2:

> THE TRIAL COURT ERRED BY IMPROPERLY ADMONISHING APPELLANT-PETITIONER'S WITNESS UNDER THE CIRCUMSTANCES OF THE CASE.

On January 22, 1996, Moman, non-custodial father of four-year-old J.M., filed a petition under R.C. 3113.31 captioned "Petition for Temporary Protection Order." Moman's petition alleged that Karen Smith, J.M.'s mother, and Smith's boyfriend, Clint Howard, "have knife fights" in front of J.M., and that Howard was mentally and sexually abusing J.M. After an emergency ex parte hearing on January 22, the trial court granted Moman temporary custody of J.M. and ordered a full hearing to be held within ten days. After the full hearing on January 31, 1996, the magistrate dismissed Moman's petition for protective custody. The magistrate filed a supplemental decision on March 13, 1996, and the trial court adopted the magistrate's decision on April 8, 1996.

On appeal, Moman complains under his first assignment of error that the trial court arbitrarily prevented him from repeating certain out-of-court statements that J.M. had made. At the hearing, Moman described certain instances of his daughter's behavior that he attributed to sexual abuse. When Moman attempted to describe what his daughter had said during the behavior, the trial court sustained appellees' hearsay objection Moman now argues, in effect, that the trial court was obligated to hold a separate hearing, sua sponte, to determine whether J.M.'s out-of-court declarations were admissible under Evid. R. 807. This court disagrees.

Evid. R. 807 provides for the admission of out-of-court statements from a child victim under the age of twelve where such statements describe, inter alia, any sexual act performed by, with, or on the child. Evid.R. 807 establishes four requirements for admission: (1) the statement must be trustworthy; (2) the child's testimony must be unavailable; (3) there must be independent proof of the act; and (4) the proponent of the evidence must notify all parties at least ten days before trial that the statement will be offered in evidence. Pursuant to Evid. R. 807(C), "[t]he court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling."

Despite its relationship to Confrontation Clause concerns in criminal cases, see State v. Dever (1992), 64 Ohio St.3d 401,410, Evid. R. 807 is equally applicable to domestic relations cases in which the admissibility of the hearsay statements of an allegedly abused child under the age of twelve is at issue. Schulte v. Schulte (June 11, 1993), Wood App. No. 91WD075, unreported, citing Evid. R.

101(A). In this case, however, Moman's trial counsel did not attempt to introduce J.M.'s out-of-court statements under Evid. R. 807. Moman made no apparent effort to bring J.M. to the hearing, or to bring the magistrate to J.M. Moman simply made no attempt to satisfy the requirements necessary for application of Evid. R. 807.[1]

Under the circumstances, the trial court's failure to admit J.M.'s out-of-court statements was not arbitrary or capricious, and did not amount to an abuse of discretion. Moman's first assignment of error is overruled.

Moman argues under his second assignment of error that the trial court abused its discretion by admonishing one of his witnesses before that witness testified. Moman claims that the lower court exerted improper influence over the witness and caused the witness not to testify.

Moman planned to call his grandmother, Shirley Lee, as witness at the hearing. Immediately before calling Lee to the stand, however, Moman's trial counsel asked to talk off the record with the magistrate in chambers. After that

---

[1] Even if this ocurt were to conclude that the trial court erred in not considering Evid.R. 807 sua sponte, Evid. R. 807 explicitly requires the proponent of a statement under that rule to notify all other parties, in writing and at least ten days before the heating of trial, of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness. Evid.R. 807(A)(4). Moman could not have satisfied all the requirements of the rule on the date of the hearing.

conversation, Lee took the stand, and the following colloquy took place:

> THE COURT: I'll indicate, first of all, ma'am, that any testimony that you give today -- I guess -- I'll retract that. Mr. Ferguson [Moman's counsel], you understand, doesn't represent your interest in court here today, he's representing your son [sic].
>
> MRS. LEE: Right.
>
> THE COURT: Okay. And you understand that anything that you say today may be used against you in the future in a criminal proceeding, that you're entitled to speak to counsel prior to your testimony, or not testify if you think it may incriminate you. Do you understand those rights?
>
> MRS. LEE: Yes.
>
> THE COURT: Okay.
>
> MR. FERGUSON: Shirley, you --
>
> THE COURT: I'm sorry. Do you want to waive your right to counsel, your right to immunity today?
>
> MRS. LEE: I think it would be right to have a counselor.
>
> THE COURT: Okay.
>
> MRS. LEE: But I don't have one.

> THE COURT: Does that mean that you want to go forward and testify today?
>
> MRS. LEE: I can testify to some things.
>
> MR. FERGUSON: Probably, it might be a good idea if maybe we hold her in rebuttal and Mr. Gregory can put on his witnesses. And if we need to bring in Mrs. Lee, then we'll do it. But I don't want to force an individual to testify under the circumstances.
>
> THE COURT: I understand that; I think that's probably wise. Mrs. Lee, you can have a seat back outside, Okay?

The magistrate should have indicated on the record why she believed it was proper to admonish Lee. This court notes, however, that the magistrate only admonished Lee after Moman's trial counsel spoke with the magistrate off the record. Moreover, Moman's trial counsel did not object to the trial court's admonishments. Under these circumstances, this court concludes that the magistrate's actions in admonishing Lee amounted to at most harmless error. Moman's second assignment of error is overruled.

The decision whether or not to grant a civil protection order is within the discretion of the trial court. Deacon v. Landers (1990), 68 Ohio App.3d 26, 31. On appeal, this court must determine whether the trial court abused its discretion in determining whether or not the petitioner presented clear and convincing evidence that civil domestic violence had occurred. O'Hara v. Dials (Feb. 2, 1996), Erie App. No. E-95-044, unreported at 7. There was affirmative evidence

before the trial court to support its decision to dismiss Moman's petition. Jennifer Vanderhorst, an intake investigator responsible for investigating child abuse allegations for the Clermont County Department of Human Services, testified at the hearing. Vanderhorst stated that she had interviewed Karen Smith, Clint Howard, and J.M. about the sexual abuse allegations. Vanderhorst also stated that she tried to contact Moman, but he never returned any of her messages. Vanderhorst testified that she found no evidence to support Moman's allegations. Under the circumstances here, the trial court did not abuse its discretion in dismissing Moman's petition.

Judgment affirmed.

WALSH, P.J., and POWELL, J., concur.

APPENDIX F

IN THE COURT OF COMMON PLEAS

Case No. 97-CR-0368

State of Ohio,)

County of Medina,)

State of Ohio,	)
Plaintiff,	)
	)
v.	)
	)
Kenneth King,	)
Defendant.	)
	)

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

DEAN HOLMAN, PROSECUTING ATTORNEY
by David Sheldon, Esq.,
Frank Raso, Esq.,
Attorneys on behalf of the State.

PALECEK, McILVAINE, PAUL & HOFFMAN
by Dennis Paul, Esq.,
David Shivley, Esq.,
Attorneys on behalf of the Defendant.

****

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. . . . It just says panty extracts, 1.1 and 1.2. It doesn't say anything about those.

Q. I am asking specifically, was it identified to you by BCI what those contain?

A. Those samples, what is contained in here, or what type of stain?

Q. You remember what type of sample?

A. Right. They say cutting, one is semen and amylase, but they say -- it doesn't say anything in the cover letter, on the envelope it says plus saliva.

THE COURT: At this point, we will take about a ten minute recess.

(At this time, a recess was taken.)

THE COURT: Earlier, the State indicated it wished to use an out of Court statement made by the child, alleged victim in this case, who is under twelve years of age at the time of trial, add who had given, apparently, an out of Court statement to the Department of Human Services and/or the Medina County Sheriff's Office.

The defense raised the issue that the proponent of the statement, who would be the State of Ohio, had not notified all other parties, in writing, to the content of the statement, the time and place the statement was made, the identity of the witnesses who testified about the statement, and the circumstances surrounding the statements are claimed to indicate its trustworthiness.

The Court can find very little on 807.

The Court finds there is somewhat of an inconsistency in 807. The inconsistency comes about in this situation. 807-A-2 says one of the foundational requirements that the Court makes is that the child's testimony is not reasonably obtained by the proponent of the statement, and then B says, the child's testimony is not reasonably obtained by the proponent of the statement under Division A-2 only if one or more apply.

Child refuses to testify concerning the subject matter, or claims a lack of memory of the subject matter of the statement after a person trusted by the child urges the child to both describe the acts described in the statement and to testify.

Yvonne Eberhart was called to the stand. She is a child of six years old.

She claimed a lack of memory on the subject matter of, apparently, of a statement she gave to the police and Children's Services.

At the time she did that, when she first testified, she was in the presence of her grandmother, and after there was a recess, and she was then in the presence of her mother, and now the Court does not know if they were urging her to describe the statement and to testify.

The Court understands that the defense is satisfied that did occur, even though outside the presence of the Court, is that correct, Mr. Paul?

MR. PAUL: Yes, Your Honor.

THE COURT: And you are waiving that requirement that it actually be in the Court itself?

MR. PAUL: I am waiving the requirement she be brought back and go through the coaching. I think that was done Friday.

Just for the record, I do raise the objection to the Court's ruling on this, for the record.

THE COURT: I haven't got there yet, but I will give you the opportunity. Therefore, the Court finds that the Rule puts the State in a very interesting position.

If a child has claimed to the State that they have a memory of the subject matter, and is called, and then the child refuses to testify, the only way the State could give the ten day notice would be for the Court to recess the jury trial for ten days while the notice is given, resume it after ten days, and continue with the hearsay statement.

That seems to be very impractical.

Therefore, this Court holds that when the State claims that the child's testimony in a sexual abuse is not reasonably obtainable by the proponent of the statement because the child refuses to testify, or claims a lack of memory of the subject matter of the statement, then that ten day requirement is waived for good cause.

However, the Court would still have to make the determination under 807-A-1, 807-A-3, 807-A-2.

In this case, the Court has found the child's testimony is not reasonably obtainable because the child refused to testify; therefore, for the record, that finding is made.

There is independent proof of the sexual act, if the DNA testimony comes in, that would be sufficient independent proof, leaving the Court then to make the determination under A-1.

Objections are certainly noted.

The record should reflect that the defense is objecting to this Court's ruling, and that its stipulation, or waiving the argument, or waiving the requirement the child be brought back into Court does not in any way waive its objection to the ten day rule not being followed.

MR. PAUL: Your Honor, the only thing I would add to the record is the defense would like to view, we have not seen the tape since this investigation began, and we would like to view the tape before it is shown to the jury so we can take a look and see whether or not it fulfills the requirements.

THE COURT: The Court believes it would also have to review the tape before it is shown, under 807-A-1, so therefore at the very least it will have to be reviewed by the Court, which, of course, counsel and parties are allowed to be at, obviously, because I will do this in the Courtroom, outside the presence of the jury.

In addition, it would seem to me that if the State is claiming exemption from the ten day rule because it had no notice the child would refuse to testify, then, obviously, the State should turn over all the statements before they are introduced so the defense can look at them.

MR. SHELDON: It is on video, Judge.

THE COURT: Then we can all see it.

All right, let's bring them back in.

(At this time, the jury was returned to the Courtroom.)

THE COURT: Okay, Mr. Paul, you are back on cross-examination.

MR. PAUL: Thank you.

Q. Miss Grossweiler, I think we stopped cross-examination when we were talking about Plaintiff's Exhibit No. 1, and I wrote a question down here just after the break.

Do you know when you received this from Brenda Geraldi of the Ohio Bureau of Criminal Investigation, whether or not she ran any other tests, other than for saliva, as it relates to the enzyme amylase?

A. No, I do not. . . .

(2)

Supreme Court, U.S.
FILED
MAR 22 2001
OFFICE OF THE CLERK

No. 00-1336

In the
Supreme Court of the United States

KENNETH KING,

Petitioner,

v.

STATE OF OHIO,

Respondent,

On Petition For Writ of Certiorari
To The Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Dean Holman
Prosecuting Attorney
Medina County, Ohio
72 Public Square
Medina, Ohio 44256
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Counsel for Respondent

QUESTIONS PRESENTED

1. Whether substantial, as opposed to strict, compliance with a deeply rooted hearsay exception for the statements of young children in abuse situations violates a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment?

2. Whether the appointment of a guardian *ad litem* for a minor witness, the invocation by that guardian *ad litem* of the privilege against self-incrimination on behalf of that minor witness, and the exclusion of that minor witness from appearing in open court simply to invoke his privilege against self-incriminating in front of the jury violates a criminal defendant's rights under the Compulsory Process Clause of the Sixth Amendment?

3. Whether alleged mistakes on the part of trial counsel and the hearing impairment of lead trial counsel, which were not prejudicial to the outcome of the case, violate a criminal defendant's right to effective assistance of counsel under the Sixth Amendment?

4. Whether alleged constitutional errors in admitting or excluding evidence concerning the identity of the perpetrator of certain criminal sex offenses were harmless beyond a reasonable doubt, where DNA evidence was introduced which conclusively identified the criminal defendant on trial as the perpetrator of those offenses?

PARTIES TO THE PROCEEDING

Petitioner

Kenneth King, an individual with no corporate affiliations.

Respondent

The State of Ohio.

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OPINIONS BELOW

The Ohio Court of Appeals for the Ninth Judicial District affirmed the trial court's judgment of conviction in an unreported decision. (*See* Appendix A). The Supreme Court of Ohio declined jurisdiction in State v. King (2000), 90 Ohio St.3d 1428, 736 N.E.2d 25, and later denied a motion for reconsideration in State v. King (2000), 90 Ohio St.3d 1474, 738 N.E.2d 384 .

JURISDICTION

The Supreme Court of Ohio entered its judgement declining jurisdiction on October 4, 2000. State v. King (2000), 90 Ohio St.3d 1428, 736 N.E.2d 25. The Supreme Court of Ohio denied Petitioner's motion for reconsideration on November 22, 2000. State v. King (2000), 90 Ohio St.3d 1474, 738 N.E.2d 384. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND EVIDENCE RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

> liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article I, Section 10 of the Ohio Constitution provides, in relevant part, that:

> * * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the

> trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself * * *.

Ohio Evid.R. 803, which sets forth hearsay exceptions where the availability of the declarant is immaterial, states in relevant parts that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.
>
> (2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> * * *
>
> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof

insofar as reasonably pertinent to diagnosis or treatment. * * *

Ohio Evid.R. 807, which sets forth the hearsay exception for the statements of young children in abuse situations, states that:

> (A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:
>
> (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making

this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

* * *

(C) The court shall make the findings required by this rule on the basis of a hearing conducted

outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

STATEMENT OF THE CASE

On November 20, 1997, the Medina County, Ohio Grand Jury returned a two count indictment charging Petitioner Kenneth King (hereinafter "Petitioner") with one count of rape in violation of Ohio Revised Code § 2907.02 and one count of gross sexual imposition in violation of Ohio Revised Code § 2907.05. The victim as to both counts was a young girl identified as "Y.E." who was four years old at the time of the offenses.

On January 5, 1998, the Medina County Grand Jury returned another two count indictment charging Petitioner with one count of rape in violation of Ohio Revised Code § 2907.02 and one count of gross sexual imposition in violation of Ohio Revised Code § 2907.05. The victim as to both counts was another young girl identified as "D.A." who was four years old at the time of the offenses, which took place some 12-to-18 months prior to the offenses against Y.E. The circumstances of Petitioner's offenses against D.A. were virtually identical to his offenses against Y.E. The case was resolved without a trial by Petitioner pleading guilty to sexual battery in violation of Ohio Revised Code § 2907.03(A)(5) and to gross sexual imposition in violation of Ohio Revised Code § 2907.05(A)(4) on February 3, 1999. He was subsequently sentenced to a total prison term of four years as to those offenses. Petitioner did not appeal from his convictions and sentences in that case.

With regard to the instant case, Y.E. was one of the children cared for by Petitioner's wife at her day care center

located at the King residence in the City of Wadsworth, Medina County, Ohio. On the afternoon of Friday, May 25, 1997, while he was briefly alone with Y.E., Petitioner performed oral sex on the four year old girl, touched her vaginal area with his penis, and ejaculated on her.

On Saturday morning, May 26, 1997, Y.E. revealed to her mother, Colleen Spangle, what Petitioner had done to her the previous afternoon. Y.E. identified Petitioner by his first name "Kenny." Ms. Spangle and her friend, Joanne Reber, then took Y.E. to meet with both Det. Warren Walter of the Medina County Sheriff's Department and Ms. Joan Selby, a licensed social worker employed by the Medina County Department of Human Services. In a videotaped interview with Det. Walter and Ms. Selby, Y.E. again disclosed what Petitioner had done to her. During the car ride home that afternoon, Y.E. made additional disclosures to Ms. Spangle and Ms. Reber.

Ms. Spangle took Y.E. to Dr. Suzanne LeSure, Ph.D., a licensed clinical psychologist who treats both victims and perpetrators of sexual abuse, for treatment and counseling at her offices in Medina, Ohio. During the course of their sessions, Dr. LeSure noted that Y.E.'s mannerisms, her behavior in wearing layers of clothing on a hot summer day, her developmentally-appropriate language and her description of the events at Petitoner's residence on May 25, 1997, were all consistent with that of a young child who had been sexually abused.

Ms. Spangle turned over the clothing that Y.E. had been wearing on the afternoon of May 25, 1997 to the Medina County Sheriff's Department, including Y.E.'s panties. Laboratory tests performed on Y.E.'s panties at the Ohio Bureau of Criminal Identification and Investigation (BCI&I) in Richfield, Ohio, revealed the presence of semen therein. DNA

tests on Y.E.'s panties were subsequently conducted at Cellmark Laboratories in Germantown, Maryland. Comparisons made between the DNA found in the semen from Y.E.'s panties, and blood samples obtained from both Petitioner and Y.E., indicated that Petitioner could not be excluded as the primary source of that semen. Dr. Charlotte Word-a doctor of molecular biology and Assistant Director of Cellmark Laboratories-testified at Petitioner's trial that one would expect to find the same genetic material in the semen from Y.E.'s panties in only 1 out of every 82 million caucasian males. Petitioner himself is a caucasian male.

Petitioner nonetheless denied committing the sex offenses against Y.E. , and alleged that his teenaged step-nephew, "B.R.", was the perpetrator. However, Y.E. never identified anyone other than Petitioner as the perpetrator.

A jury trial was held from August 12, 1998 through August 25, 1998 before the Honorable James L. Kimbler, Judge of the Medina County Court of Common Pleas. Petitioner was present in court and represented by trial counsel, Dennis E. Paul and David A. Shively. The State of Ohio was represented by David C. Sheldon and Frank A. Raso, Assistant Medina County Prosecuting Attorneys.

The State introduced testimony from the following witnesses concerning Y.E.'s disclosures of sexual abuse by Petitioner: Dr. LeSure, the treating clinical psychologist; Ms. Spangle, Y.E.'s mother; Ms. Reber, a friend of Ms. Spangle; and Ms. Selby, the social worker who first interviewed Y.E. The trial court allowed the State to introduce the video tape of Ms. Selby's interview with Y.E., because Y.E. herself was unable to testify at trial that Petitioner committed the charged offenses. Pursuant to Ohio Evid.R. 404(B), the trial court also allowed the State to introduce testimony from both D.A.'s mother and Dr. LeSure, who was counseling both Y.E. and D.A.,

concerning Petitioner's previous offenses against D.A. in order to establish the identity of the perpetrator in the instant case. The State further introduced the aforementioned DNA evidence, which conclusively identified Petitioner as the source of the semen found in Y.E.'s panties.

Petitioner sought to have B.R. testify at trial. However, B.R. invoked his Fifth Amendment privilege against self-incrimination through his guardian *ad litem*. Petitioner then sought to have B.R.'s psychologist, Dr. Ann Carden, testify to admissions which B.R. made to her. Although B.R.'s mother had waived his psychologist-patient privilege prior to the trial in order to allow Dr. Carden to reveal B.R.'s privileged statements to Petitioner's defense counsel, the trial court allowed B.R., through his guardian *ad litem*, to assert his psychologist-patient privilege and prevent Dr. Carden from testifying at trial.

On August 25, 1998, the jury returned verdicts of guilty as to both counts set forth in the indictment. Petitioner was subsequently sentenced to a total prison term of nine years. Petitioner directly appealed his conviction in the instant case. On May 31, 2000, the Ohio Court of Appeals for the Ninth Judicial District overruled Petitioner's four assignments of error and affirmed his conviction. (*See* Appendix A). On October 4, 2000, the Supreme Court of Ohio declined jurisdiction. On November 22, 2000, the Supreme Court of Ohio denied Petitioner's motion for reconsideration.

REASONS FOR DENYING THE PETITION

I. **Petitioner's rights under the Confrontation Clause of the Sixth Amendment were *not* violated.**

In Idaho v. Wright, 497 U.S. 805, 818, 110 S.Ct. 3139, 3148, 111 L.Ed.2d 638 (1990), this Court held that the admission of certain hearsay statements made by a child declarant to an examining pediatrician violated the criminal defendant's rights under the Confrontation Clause of the Sixth Amendment, where those statements were not admitted pursuant to a "firmly rooted" hearsay exception and did not bear "particularized guarantees of trustworthiness." The Idaho trial court had not admitted the child's statements under the firmly rooted hearsay exception for statements made for medical diagnosis or treatment, but rather under a residual hearsay exception for "statement[s] not specifically covered by any of the foregoing [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness * * *." Id. at 812, 110 S.Ct. at 3144-45.

This Court went on to state that:

> We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.
>
> * * *
>
> As our discussion above suggests, we are unpersuaded by the State's contention that

> evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.' To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.

Id. at 820-22, 110 S.Ct. at 3149-50.

Following this Court's decision in Idaho v. Wright, supra, the State of Ohio adopted Evid.R. 807 which recognizes a hearsay exception for the statements of young children in abuse situations. Ohio Evid.R. 807 accords with right of confrontation of witnesses guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. State v. Storch, 66 Ohio St.3d 280, court's syllabus at one, 612 N.E.2d 305 (1993).

Ohio Evid. R. 807(A) establishes four requirements for admission: (1) the statement must be trustworthy, (2) the child's testimony must be unavailable, (3) independent proof of the act must exist, and (4) the proponent must notify all other parties ten days before trial that such a statement will be offered in evidence. In addition, there are age and subject matter requirements: the child must be under 12 years old and the statement must relate to an act of sexual abuse or physical violence. Pursuant to Ohio Evid.R. 807(C), the trial court must also make findings of fact to support its general findings with respect to the four requirements of Ohio Evid.R. 807(A). State v. Said, 71 Ohio St.3d 473, 477-78, 644 N.E.2d 337, 341 (1994).

In the instant case, the trial court determined that Y.E., who was six years old at the time of trial, was competent to testify following an examination of Y.E. out of the presence of the jury. However, when she was subsequently called as a witness by the State of Ohio to testify in open court, Y.E. refused to testify about any matters relevant to this criminal case. Y.E. was then excused. Due to Y.E.'s unexpected refusal to testify, the State of Ohio informed both the trial court and defense counsel that it would seek to introduce the video taped interview of Y.E., which was conducted by Ms. Selby on May 26, 1997, into evidence pursuant to Ohio Evid.R. 807.

It is undisputed that Y.E. was under the age of 12 years old and that her videotaped interview by Ms. Selby related to acts of sexual abuse. Having directly observed Y.E.'s refusal to testify, the trial court made the specific determination on the record, pursuant to Ohio Evid.R. 807(A)(2), that the child's testimony was not reasonably obtainable. The trial court also determined on the record, pursuant to Ohio Evid.R. 807(A)(3), that there was independent proof of the sexual act in the form of DNA evidence. After viewing the videotaped interview out of the presence of the jury, the trial court made the further determination on the record, pursuant to Ohio Evid.R. 807(A)(1), that the statements made by Y.E. to Ms. Selby on that videotape were at least as reliable as statements admitted under Ohio Evid.R. 803 and 804. The videotaped interview took place less than twenty-four hours after the sexual offenses occurred and, thus, Y.E.'s statements to Ms. Selby would otherwise have been admissible under Ohio Evid.R. 803(1) and/or Ohio Evid.R. 803(2) as a present sense impression or an excited utterance.

The State admittedly did not comply with the ten-day notification requirement of Ohio Evid.R. 807(A)(4), because it intended to present direct testimony at trial from Y.E. herself. However, the State listed that videotaped interview in the

pretrial discovery materials provided to Petitioner. Moreover, the trial court, as well as both parties, viewed the videotape on the evening before the trial court actually ruled on its admissibility into evidence. As noted in the decision of the Ninth District Court of Appeals, Petitioner did not move for a continuance or aver that he needed additional time to prepare to rebut that videotape. (*See* Appendix A at p. 9a). Thus, Petitioner was not prejudiced by the State's failure to strictly comply with the ten-day notice requirement of Ohio Evid.R. 807(A)(4).

Because there was substantial compliance with the requirements of Ohio Evid.R. 807 prior to the trial court's admission of the videotaped interview into evidence, Petitioner's rights under the Confrontation Clause of the Sixth Amendment were not violated. His Petition for Writ of Certiorari should therefore be denied.

II. Petitioner's rights under the Compulsory Process Clause of the Sixth Amendment were *not* violated.

Petitioner's trial strategy was to shift blame away from himself to his teenage step-nephew, B.R., by claiming that B.R. was the perpetrator of the sex offenses against Y.E. To this end, Petitioner called B.R. as a defense witness. Although Petitioner could not compel B.R. to waive his Fifth Amendment privilege against self-incrimination, B.R.'s mother–who was also Petitioner's sister-in-law–wanted B.R. to testify at trial. Petitioner now claims that the trial court erred by appointing a guardian *ad litem* for B.R. and by permitting that guardian at litem to invoke B.R.'s privilege against self-incrimination.

The Fifth Amendment privilege against self-incrimination is applicable in any proceeding civil or criminal,

formal or informal, where the answers might incriminate the witness in future criminal proceedings. Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). The privilege is applicable to, and may be exercised by, juveniles as well as adults. In re Gault, 387 U.S. 1, 55, 87 S.Ct. 1428, 1458, 18 L.Ed.2d 527. (1967).

Petitioner does not cite any authority whatsoever to support his proposition that "as his mother and legal guardian, [B.R.'s mother] had the unfettered right to invoke or waive any and all rights which her son may have pursuant to the United States (and/or Ohio) Constitution." (*See* Petition for Writ of Certiorari at 23). To the contrary, it is well settled that the constitutional privilege against self-incrimination is a personal one which cannot be exercised by third parties. United States v. Nobles, 422 U.S. 225, 233, 95 S.Ct. 2160, 2167, 45 L.Ed.2d 141 (1975); and Couch v. United States, 409 U.S. 322, 328, 93 S.Ct. 611, 616, 34 L.Ed.2d 548 (1973).

There is no Ohio case which has held that a parent could waive a constitutional right of a minor child in a juvenile or criminal case. In re Collins, 20 Ohio App.2d 319, 321-22, 253 N.E.2d 824 , 826-27 (1969); *see also* In re Doyle, 122 Ohio App.3d 767, 771-72, 702 N.E.2d 970, 973 (1997); and In re East, 105 Ohio App.3d 221, 224-25, 663 N.E.2d 983, 985 (1995). Indeed, courts in other jurisdictions have held that, where the interests of a parent and minor child concerning the exercise or waiver of a testimonial privilege do not coincide, a guardian *ad litem* should be appointed to act on behalf of the minor child. *See* State ex rel. Wilfong v. Schaeperkoetter, 933 S.W.2d 407, (Mo. 1996); State v. S.H., 159 Wis.2d 730, 465 N.W.2d 238 (1990); and Nagle v. Hooks, 296 Md. 123, 460 A.2d 49 (1983).

In the instant case, the trial court properly appointed a guardian *ad litem* to act on B.R.'s behalf when it appeared that B.R.'s mother was not acting in his best interests, but rather in

the interests of her brother-in-law the Petitioner. It was clearly in B.R.'s best interests to assert his Fifth Amendment privilege against self-incrimination, where Petitioner was attempting to falsely blame him for the sex offenses perpetrated against Y.E.

Petitioner next claims that the trial court erred and abused its discretion by excluding B.R. from appearing in open court as a witness on Petitioner's behalf, after the guardian *ad litem* asserted B.R.'s privilege against self-incrimination in the judge's chambers. However, Petitioner's reliance on State v. Dinsio, 176 Ohio St. 460, 200 N.E.2d 471 (1964), and Columbus v. Cooper, 49 Ohio St.3d 42, 550 N.E.2d 937 (1990), is misplaced.

The Supreme Court of Ohio has more recently held that a trial court may exclude a person from appearing as a witness on behalf of a criminal defendant at trial if the court determines that the witness will not offer any testimony, but merely intends to assert the Fifth Amendment privilege against self-incrimination. State v. Kirk, 72 Ohio St.3d 564, court's syllabus at one, 651 N.E.2d 981 (1995) (distinguishing and limiting Columbus v. Cooper, supra). The exclusion of such a witness does not violate the Compulsory Process Clause. Kirk, supra. Thus, a criminal defendant does not have a right to place a witness on the stand for the sole purpose of having him assert his Fifth Amendment privilege in front of the jury. Kirk, supra at 569, 651 N.E.2d at 984.[1]

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[1] *See also* United States v. Arnott, 704 F.2d 322 (6th Cir. 1983); United States v. Johnson, 488 F.2d 1206 (1st Cir., 1973); United States v. Beye, 445 F.2d 1037 (9th Cir., 1971); and Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), certiorari denied (1971), 401 U.S. 995, 91 S.Ct. 1240, 28 L.Ed.2d 533.

The trial court did not err by appointing a guardian at litem, by permitting that guardian *ad litem* to invoke B.R.'s privilege against self-incrimination, or by excluding B.R. from appearing in open court for the sole purpose of having him assert his Fifth Amendment privilege in front of the jury. Because Petitioner's rights under the Compulsory Process Clause were not violated, his Petition for Writ of Certiorari should be denied.

III. Petitioner was *not* denied effective assistance of counsel as guaranteed under the Sixth Amendment.

The Sixth Amendment right to counsel is the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). To establish a claim of ineffective assistance of counsel, a convicted defendant must demonstrate (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonable representation, and (2) that he was prejudiced by counsel's deficient performance. Strickland, supra at 687-88, 104 S.Ct. at 2064; State v. Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373 (1989), cert. denied, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768.

The proper standard for reviewing attorney performance is that of reasonably effective assistance. Strickland at 687-88, 104 S.Ct. at 2064. There is a strong presumption that counsel's performance was effective. Id. at 689, 104 S.Ct. at 2065; *see also* Bradley, supra at 142, 538 N.E.2d at 379-80. Because there are countless ways to provide such effective assistance, judicial scrutiny of counsel's performance must be highly deferential- every effort must be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate that conduct from counsel's perspective at the time. Id. A

convicted defendant must overcome the presumption that the alleged errors of counsel "might be considered sound trial strategy." Strickland, supra at 689, 104 S.Ct. at 2065.

With regard to the required showing of prejudice, the proper standard is that the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, supra at 694-95, 104 S.Ct. at 2068-69. In making this determination, a reviewing court must consider the totality of the evidence that was before the trier of fact. Id.

Petitioner alleges that he was denied effective assistance of counsel on four separate grounds. First, Petitioner claims that trial counsel was ineffective for not objecting to the inclusion of testimony from Dr. LeSure, the treating clinical psychologist for both Y.E. and D.A., without first ascertaining whether Y.E. and D.A. were unavailable to testify or whether there was any other hearsay exception available. However, under Ohio Evid.R. 803(4) which sets forth the firmly rooted hearsay exception for statements made for purpose of medical diagnosis or treatment, the availability of the declarant is immaterial. State v. Dever, 64 Ohio St.3d 401, 416-18, 596 N.E.2d 436, 448-49 (1992), cert. denied 507 U.S. 919, 113 S.Ct. 1279, 122 L.Ed.2d 672; citing White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). Statements made by a young child to a clinical psychologist during therapy fall within the meaning of "medical treatment" under Ohio Evid.R. 803(4). State v. Vaugn 106 Ohio App.3d 7775, 780-81, 667 N.E.2d 82, 85-86 (1995); and State v. Kelly, 93 Ohio App.3d 257, 264-65, 638 N.E.2d 153, 158 (1994). Thus, trial counsel was not deficient for failing to object to Dr. LeSure's testimony, and Petitioner was not prejudiced by trial counsel's failure to object.

Second, Petitioner claims that trial counsel was ineffective for failing to specifically object to the prosecution's failure to strictly comply with the formal ten-day written notification requirement of Ohio Evid.R. 807(A)(4), prior to the admission of Ms. Selby's videotaped interview with Y.E. However, trial counsel was made aware of the video tape in question during pretrial discovery well in advance of trial. Petitioner did not request a continuance or aver that he needed additional time to prepare to rebut that videotape. Thus, Petitioner was not prejudiced by the prosecution's failure to strictly comply with Ohio Evid.R. 807(A)(4).

Third, Petitioner claims that lead trial counsel, Dennis E. Paul, was ineffective in trying this case due to his hearing impairment. However, Petitioner was cognizant of Mr. Paul's hearing impairment prior to trial when he retained Mr. Paul as his attorney. The trial court made reasonable accommodations for Mr. Paul by allowing him to sit close to the witness stand throughout trial. Mr. Paul was also assisted at trial by co-counsel David A. Shively, an experienced trial attorney whose sense of hearing was fine. Therefore, Petitioner cannot demonstrate any prejudice arising from lead trial counsel's hearing impairment. *See* Sorensen v. State, 6 P.3d 657 (Wyo. 2000) (denying an ineffective assistance of counsel claim premised on the failure of counsel to secure removal of a hearing-impaired juror).

Fourth, Petitioner claims that trial counsel was ineffective for failing to raise on direct appeal the alleged error by the trial court in admitting, pursuant to Ohio Evid.R. 803(2) which sets forth the firmly rooted hearsay exception for excited utterances, testimony from D.A.'s mother concerning statements made by D.A. identifying Petitioner as the perpetrator of the sex offenses against her. However, as previously noted, D.A.'s statements were also admitted pursuant to Ohio Evid.R. 803(4) through the testimony of Dr.

LeSure. Therefore, Petitioner cannot demonstrate any prejudice arising from either the testimony of D.A.'s mother or from trial counsel's failure to raise this evidentiary issue on direct appeal.

Because no prejudice resulted from the allegedly deficient performance of trial counsel, Petitioner was not denied effective assistance of counsel as guaranteed under the Sixth Amendment. Therefore, his Petition for Writ of Certiorari should be denied.

IV. The alleged constitutional errors raised by Petitioner were harmless, given the conclusive DNA evidence presented by the State of Ohio.

Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

Applying the constitutional harmless error rule of Chapman, supra, in Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), this Court held that error in admitting the confessions of two non-testifying co-defendants into evidence at trial, in violation of the petitioner's rights under the Confrontation Clause of the Sixth Amendment, was harmless beyond a reasonable doubt due to the incriminating testimony presented by a third co-defendant and petitioner's own incriminating admissions.

In the instant case, the essential element in dispute at trial was the identity of the perpetrator of the sex offenses against Y.E. However, the DNA evidence introduced by the State conclusively established that Petitioner, a caucasian male, was the source of the semen found in Y.E.'s panties. One

would expect to find that same genetic material in only 1 out of every 82 million caucasian males. Standing alone, this DNA evidence was sufficient to identify Petitioner as the perpetrator of the sex offenses against Y.E. beyond any reasonable doubt.

Thus, any alleged constitutional error on the part of the trial court in admitting the video tape of Ms. Selby's interview with Y.E., pursuant to Ohio Evid.R. 807, to establish the element of identity was harmless beyond a reasonable doubt.[2] Any alleged constitutional error on the part of the trial court in appointing a guardian *ad litem* for B.R., permitting that guardian *ad litem* to invoke B.R.'s privilege against self-incrimination, and excluding B.R. from appearing in open court simply to invoke his privilege in front of the jury was also harmless beyond a reasonable doubt. Finally, any alleged constitutional error on the part of the trial court in admitting testimony from Dr. LeSure, pursuant to Ohio Evid.R. 803(4), concerning Y.E's and D.A.'s respective identification of Petitioner as the perpetrator of the nearly identical sex offenses against them, and in admitting further testimony from D.A.'s mother, pursuant to Ohio Evid.R. 803(2), concerning D.A.'s identification of Petitioner, was harmless beyond a reasonable doubt.

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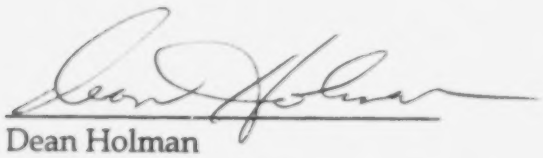
[2] *See* Larson v. Nutt, 34 F.3d 647, 648 (8th Cir. 1994).

CONCLUSION

Based on the foregoing, the State of Ohio respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

[Filed May 31, 2000]

C.A. No. 2963-M

STATE OF OHIO
COUNTY OF MEDINA

STATE OF OHIO
Appellee

v.

KENNETH D. KING
Appellant.

APPEAL FROM JUDGMENT ENTERED
IN THE COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE NO. 97-CR-0368

DECISION AND JOURNAL ENTRY

Dated: May 31, 2000

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

Appellant, Kenneth King, appeals his conviction in the Medina County Court of Common Pleas. We affirm.

I.

On November 20, 1997, the Medina County Grand Jury indicted Mr. King on one count of rape, in violation of R.C. 2907.02, and one count of gross sexual imposition in violation of R.C. 2907.05. He was indicted for committing those crimes on a young girl named "Y.E." who was under thirteen years of age at the time of the abuse.

Mr. King was separately indicted by the Medina County Grand Jury on January 5, 1998, for rape and gross sexual imposition of another young girl by the name of "D.A." The case involving D.A. was resolved by Mr. King pleading guilty to gross sexual imposition, in violation of R.C. 2907.05(A)(4), and sexual battery, in violation of R.C. 2907.03(A)(5), on February 3, 1999, and is not currently before this court.

A trial was held concerning the abuse of Y.E., commencing on August 12, 1998, in which evidence of Mr. King's abuse of D.A. was admitted over Mr. King's objection. The trial court also allowed the state to show a videotaped interview of Y.E. conducted by Joan Selby because Y.E. was unable to testify at trial that Mr. King committed the crime charged. Mr. King sought, by way of defense, to have a young

boy named "B.R." testify that he, rather than Mr. King,

committed the crimes. However, B.R. refused to testify based upon his Fifth Amendment rights. Mr. King then sought to have Dr. Ann Carden, B.R.'s psychologist testify that B.R. had admitted to Dr. Carden doing the acts for which Mr. King was being tried. However, although B.R.'s mother had waived the psychologist-patient privilege at one point, and hence, Dr. Carden had disclosed B.R.'s statements to Mr. King's defense counsel, the trial court allowed B.R. to assert the psychologist-patient privilege and ruled that Dr. Carden could not testify. Mr. King also sought to call Dr. Sandra McPherson as an expert to testify regarding the interview procedures used on D.A. The trial court ruled that, as her testimony was offered on surrebuttal, it was beyond the scope of the state's evidence on rebuttal and was inadmissible. The state also presented DNA evidence from samples of semen taken from Y.E.'s underwear that were shown to match Mr. King's DNA. In a verdict journalized on August 25, 1998, the jury convicted Mr. King of rape and gross sexual imposition. Mr. King was sentenced accordingly. This appeal followed.

II.

Mr. King asserts four assignments of error. We will address each in due course, consolidating the second and fourth to facilitate review.

A.

First Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY VIOLATING APPELLANT'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION, BY IMPROPERLY ADMITTING HEARSAY TESTIMONY UNDER EVID.R. 807

Mr. King argues that by admitting the videotaped interview of Y.E. without making the necessary findings under Evid.R.807, the trial court violated Evid. R. 807 and his right to confront his accuser under the Ohio and United States Constitutions. We disagree.

"'The trial court has broad discretion in the admission * * * of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, [an appellate] court should be slow to interfere.'" (First alteration in original.) *State v. Maurer* (1984), 15 Ohio St.3d239, 265, quoting *State v. Hammer*(1967) 9 Ohio St.2d 122, 128. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.* Moreover, a new

trial should not be granted unless the accused was prejudiced or may have been prejudiced by the evidence improperly admitted. R.C. 2945.83(C)

Evid.R.807 accords with the Confrontation Clause of the Sixth Amendment to the United States Constitution. *State v. Storch* (1993), 66 Ohio St. 3d 280, paragraph one of the syllabus.

Evid. R. 807 codifies when hearsay statements made by an abused child are admissible. Avatar 807 states, in relevant part:

> (A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R.802 if all of the following apply:
>
> (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its

determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elect, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

> (B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:
>
> (1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.
>
> * * *

In *State v. Said* (1994), 71 Ohio St.3d 473, 477, the Ohio Supreme Court interpreted Evid. R. 807, stating that

> (b)y its own terms, Evid. R. 807 provides what a trial court must find on the record. First, a trial must find "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness * * *." Evid. R. 807(A)(1). Second, a trial court must find that "[t]he child's testimony is not reasonable obtainable by the proponent of the statement." Evid. R. 807(A)(2). Third, a trial court must find "independent proof of the sexual act or act of physical violence. "Evid. R. 807(A)(3). Finally, a trial court must find that the proponent of the statement fulfilled the notice requirements under Evid. R. 807(A)(4).

> Evid. R. 807(c) also requires a trial court to make findings of fact to support each of the general findings.

However, "[f]indings in the form of skeletal conclusions are inadequate under Evid. R. 807[.]" *Said*, 71 Ohio St.3d at478.

In the instant case, the trial court concluded that the statements made by Y.E. were at least as trustworthy as the exceptions to the hearsay rule under Evid. R. 803 and 804. The trial court based its conclusion on Y.E.'s testimony, the statements Y.E. made on the videotape, and the testimony of Officer Warren Walter, who filmed Joan Selby's interview with Y.E. The testimony in this case showed that there was little lapse of time between the incident and Y.E.'s statements concerning the abuse during the videotaped interview with Joan Selby. Moreover, among other things, Y.E.'s statements showed a knowledge beyond that which would be expected of a child of her age and a lack of motive to fabricate. Furthermore, Mr. King did not raise a specific objection to the trial court's findings under Evid. R. 807(a)(1). Unlike the trial court in Said, the trial court below based its decision on the totality of the testimony that had been adduced up to that point in the trial. Hence, based upon this record, we cannot conclude that the trial court abused its discretion by finding that the requirements of Evid. R. 807(a)(1) were fulfilled.[3]

---

[3] Mr. King did not challenge the constutionality of Evid. R. 807 or the trial court's application of Evid. R. 807 in the trial court. Hence, Mr. King['s assignment of error as it pertains to the Confrontation Clause of the Sixth Amendment to the United States Constitution was not passed upon by the trial court and is not properly before this court.

Mr. King also argues that the trial court erred by failing to require the state to give ten days notice to him prior to trial pursuant to Evid. R. 807(A)(4). The state had planned to call Y.E. in person, and in fact did so. Y.E. , however, was unable to testify about the incident involving Mr. King when she was called to the witness stand. At that point, the state sought to introduce the videotape of Y.E.'s statements to Joan Selby. Mr. King did not move for a continuance, or aver that the needed additional time to prepare to rebut the videotaped testimony and did in fact rebut the testimony in his own case in chief. Hence, we conclude that the trial court did not err to Mr. King's prejudice by admitting the videotaped testimony of Y.E. without the state having given Mr. King ten days notice of its intent to utilized such evidence prior to trial. Mr. King's first assignment of error is overruled.

B.

Second Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT THE OPPORTUNITY TO CALL DR. ANN CARDEN TO DELIVER EXCULPATORY EVIDENCE AND TESTIMONY WHICH SUPPORTED THAT A JUVENILE NAMED "B.R." COMMITTED THE ALLEGED OFFENSE(S) AND WAS WITH THE ALLEGED VICTIM THE DAY BEFORE AND DAY OF THE ALLEGED OFFENSE(S).

Fourth Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT THE OPPORTUNITY TO CALL DR. SANDRA MCPHERSON TO DELIVER EVIDENCE REGARDING THE IMPROPER INVESTIGATORY METHODS UTILIZED BY THE STATE'S EXPERT, DR. LESURE, AND REGARDING THE SUBSTANTIAL RISK OF MIS-FOCUSED OR MISTAKEN IDENTITY INHERENT WITH DR. LESURE'S INTERVIEW PROTOCOL.

Mr. King argues that the trial court erred when it allowed B.R. to invoke the psychologist-patient privilege through a court appointed guardian ad litem after his mother had waived the privilege. Furthermore, Mr. King argues that the trial court erred when it ruled that Dr. McPherson, his expert on interrogation protocol in abused children could not testify on surrebuttal. We disagree.

"The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency. "*Pons v. Ohio State Medical Bd.* (1993), 66 Ohio St. 3d. 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgement for that of the trial court. *Id.*

B.R.'s mother admitted to the trial court that a conflict of interest might exist between her interests and those of her son. At that point, the trial court indicated that it might be appropriate for a guardian *ad litem* to be appointed to protect B.R.'s interests, as is required by R.C. 2151.28 1(A)(2) when a conflict of interest is present. The Medina County Court of Common Pleas, Juvenile Division, appointed B.R.'s attorney as his guardian ad litem, pursuant to R.C. 2151.28 (A)(2), due to the admitted conflict of interest with his mother. B.R.'s guardian ad litem then asserted the psychologist-patient privilege before the trial court, pursuant to R.C. 2317.02(B)(1). Hence, we cannot conclude that the trial court abused its discretion by excluding Dr. Carden's testimony based upon B.R.'s assertion of the psychologist-patient privilege or erred in accepting B.R.'s guarding ad litem's assertion of the privilege. See *In re Guardianship of Escola* (1987), 41 Ohio App.3d 42, 46.

Mr. King also asserts that the trial court erred when it prevented him from presenting the testimony of Dr. McPherson on surrebuttal. A previously noted, the admission and exclusion of relevant evidence is within the discretion of the trial court. Moreover, "[t]he denial of surrebuttal testimony by a criminal defendant lies solely within the discretion of the trial court [and a] court does not, *ipso facto*, abuse its discretion in denying a criminal defendant the opportunity to present surrebuttal testimony." (Citation omitted.) *State v. Spirko* (1991), 59 Ohio St.3d 1, 28. After reviewing the record, we cannot conclude that the trial court acted with passion, prejudice or the like in excluding the testimony of Dr. McPherson. Moreover, even if the trial court had erred in excluding Dr. McPherson's testimony on surrebuttal, Mr. King was allowed to present other testimony

on surrebuttal, and based on the weight of the other evidence produced at trial, any error is harmless. Mr. King's second and fourth assignments of error are overruled.

C.

Third Assignment of Error

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED THE STATE OF OHIO TO INTRODUCE EVID.R. 404(B) PRIOR BAD ACTS EVIDENCE AGAINST THE APPELLANT DESPITE A FAILURE OF THE STATE TO SUBSTANTIALLY DEMONSTRATE THAT THE APPELLANT COMMITTED THE ALLEGED PRIOR BAD ACT AND A LACK OF EVIDENCE DEMONSTRATING A DEFINITIVE IDIOSYNCRATIC PATTERN OF CONDUCT BETWEEN THE ALLEGED ACTS.

Mr. King asserts that the trial court erred by admitting testimony concerning his sexual abuse of D.A. because there was not substantial evidence that the committed the acts; moreover, the acts were not sufficiently connected to the crime charged. We disagree.

As noted above, a trial court's decision regarding the admission of evidence is reviewed under the abuse of discretion standard.

Generally, evidence of prior criminal acts, wholly independent of the crime for which defendant is on trial, is inadmissible. *State v. Thompson* (1981), 66 Ohio St.2d 496, 497. R.C. 2945.59 codifies the exceptions to this rule, providing:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system is doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Evid. R. 404(B) states that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evid. R. 404(B) is in accord with R.C. 2945.59. *State v. Broom* (1988), 40 Ohio St.3d 277, 281. "The issue of

identity, although not listed in the statute, has been held to be included within the concept of scheme, plan, or system. " *Id.* Hence, it is necessary to determine whether any of the matters

enumerated in R.C. 2945.59 were relevant at trial and, if so. whether the testimony that the prosecution elicited regarding other acts of the defendant tended to prove the relevant enumerated matter. *State v. Curry* (1975), 43 Ohio St. 2d 66, 70.

"Because R. C. 2945.59 and Evid. R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *Broom*, 40 Ohio St.3d at paragraph one of the syllabus. Moreover, evidence of other acts by a defendant is only admissible when it tends to show one of the matters enumerated in the statute and only when the evidence offered is relevant to prove the defendant is guilty of the offense in question. *State v. Burson* (1974), 38 Ohio St.2d 157, 158. Finally, the state must "offer[] substantial proof that the alleged similar act was committed by the defendant." *State v. Carter* (1971), 26 Ohio St.2d 79, paragraph two of the syllabus.

Mr. King asserted as part of his defense that B.R. had committed the crimes that he was accused of, putting identity at issue. Hence, as the alleged abuse of D.A. was close in time, as well as similar in execution, to the abuse of Y.E. , we conclude that the trial court did not abuse its discretion by admitting testimony concerning the alleged abuse of D.A. as it was relevant evidence of Mr. King's identity in this case.

Mr. King also asserts that the trial court erred in concluding that substantial evidence was produced by the state showing that he had committed the acts on D.A. After reviewing the testimony before the trial court which implicated Mr. King in the abuse of D.A., we conclude that the trial court did not err in concluding that substantial evidence existed showing that Mr. King committed the acts upon D. A. Mr. King's third assignment of error is overruled.

III.

Mr. King's four assignments of error are overruled The verdict of the Medina County Court of Common Pleas is affirmed.

Judgement affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, Directing the Court of Common Pleas, County of Medina, to carry this judgement into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R.27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(e).

Costs taxed to Appellant.

Exceptions

/s/_____
WILLIAM G. BATCHELDER
FOR THE COURT

REECE, J.
CONCURS

CARR, P.J.
CONCURS IN JUDGMENT ONLY

(Reece, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Section 6(C), Article IV, Constitution.)

(3)

Supreme Court, U.S.
FILED
APR 3 2001
CLERK

No. 00-1336

In the
Supreme Court of the United States

KENNETH KING,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RESPONSE BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE STATE OF OHIO

REASONS FOR GRANTING THE PETITION

I. The Ohio courts violated King's right to confront his accusers.

In its Brief, the State asserted the following: "The trial court allowed the State to introduce the video tape of Ms. Selby's interview with Y.E., because Y.E. herself was unable to testify at trial that Petitioner committed the charged offenses." (Brief in Opposition to Petition for Writ of Certiorari at page 8.) This is exactly what happened during the trial. Y.E. did not identify King as committing any offense against her. Y.E. testified in pertinent part:

> "Q. * * * Do you know - - let me ask you this, Yvonne, last summer, were you ever at someone's house last summer where something happened that you didn't like to you?"
> A. No.
>
> * * *
>
> Q. * * * Do you remember being touched?
> A. No.
>
> * * *
>
> Q. * * * Were you ever at Ken's house, think real hard, when Kenny did something that you didn't like?

A. No.

* * *

Q. Okay. Yvonne, I want you to think real hard, can you think of any reason in your mind why you wouldn't like Ken, can you think of any reason?

A. I don't know.

* * *

Q. Do you remember being in someone's house where something got on you that you thought was yukky?

A. No.

Q. You don't remember that, okay. Yvonne, are you uncomfortable out here in Court sitting where you are sitting?

Q. No."

(Pages 347, 348, 351, and 353 of the trial transcript.)

Ohio Evidence Rule 807 codifies when hearsay statements made by an abused child are admissible.

> "By its own terms, Evid. R. 807 provides *what a trial court must find on the record*. First, *a trial court must find* "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness * * *." Evid. R. 807 (A)(1). Second, *a trial court must find* that "[t]he child's testimony is not reasonably obtainable by the proponent of the statement." Evid. R.

> 807 (A)(2). Third, *a trial court must find* "independent proof of the sexual act or act of physical violence." Evid. R. 807 (A)(3). Finally, *a trial court must find* that the proponent of the statement fulfilled the notice requirements under Evid. R. 807 (A)(4). *Evid. R. 807 (C) also requires* a trial court to make findings of fact to support each of the general findings." (Emphasis added.)

State v. Said, 71 Ohio St.3d 473, 477, 644 N.E.2d 337, 341 (1994).

From the above record, the trial court could not find that Y.E.'s testimony was not reasonably obtainable. She testified–just not as expected by the State. She did not identify King as committing any offense against her. Additionally, the State did not fulfill the notice requirements.

The State has admitted that there are "four requirements for admission." (Brief in Opposition to Petition for Writ of Certiorari at page 11.) However, the State and the trial court have chosen to ignore these requirements.

The State then went on to argue that it could not know that a six-year-old child might not identify the alleged perpetrator in open court. This argument is absurd. How can a prosecutor claim that he had no idea that a *six*-year old might have problems testifying? Moreover, it is the position of King that Y.E. had no problems testifying. She chose to tell the truth; that King had committed no offense against her.

Additionally, the determination of a child declarant's availability is best made at a pretrial proceeding.

> "Evid.R. 807 contemplates that a pretrial hearing will be conducted at which time the ability of the child to testify should be addressed and an initial determination as to the admissibility of the child's statements should be made. This would allow both parties to prepare for trial in accordance with the trial court's ruling. A pretrial hearing would also permit an interlocutory appeal if the trial court's ruling on the child's availability and/or the admissibility of the child's extrajudicial statements so hinders the state's evidence that the state cannot proceed with its case. See *State v. Malinovsky* (1991), 60 Ohio St.3d 20, 573 N.E.2d 22."

State v. Storch 66 Ohio St.3d 280, 293, and paragraph two of the syllabus, 612 N.E. 2d 305, (1993).

Since the State wished to call Y.E., then it was incumbent on the State to request a pretrial.

Lastly, the State claims that substantial compliance with the mandates of the rule satisfy the Confrontation Clause, and that the lack of a request for a continuance by trial counsel somehow equates with a lack of prejudice. The lack of a request for a continuance is *per se* evidence of ineffective assistance of counsel. Additionally, the State was unable to point this Court to any citation support for its claim that substantial compliance is sufficient.

The State and the trial court did not follow the correct procedure, and consequently, violated King's right to confront the witnesses called to testify against him. Assuming that Ohio Evidence Rule 807 is a well-established exception to the

hearsay rule, then there is no confrontation right violation if there is compliance with the mandates of the rule. Since there was non-compliance, then the extrajudicial statements were not admissible. This is a *prima facie* violation of the Confrontation Clause of the Sixth Amendment.

In seeking to convict King, the State violated the delicate balance between a court's concern for the welfare of victims of child abuse and justice for those who are accused of such crime. The state court treatment of King violated this Court's pronouncements in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) and *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).

II. The Ohio courts violated Kings' rights pursuant to the Compulsory Process Clause

To reach its preconceived notion of justice, the State has completely ignored the status of the law with respect to the Compulsory Process Clause. Likewise, the State completely ignored the reason for calling B.R. to the stand. King called B.R. in order to demonstrate to the jury the similarities in general appearance between King and B.R. In fact, B.R. better fit the description given by the alleged victims. This is permitted by the Ohio Supreme Court's decision in *Columbus v. Cooper*, 49 Ohio St. 3d 42, 550 N.E.2d 937 (1990), and this portion of that decision has not been overruled by *State v. Kirk,* 72 Ohio St.3d 564, 651 N.E. 2d 981 (1995). As in *Cooper*, the accused's intent in calling the witness included "afford[ing] the jury the opportunity to compare the physical appearance of [the accused] and [the witness] but not to get before the jury [the witness's] assertion of his Fifth Amendment rights." *Cooper, supra* at 47, 550

N.E. 2d at 941. B.R. should have been compelled, at the very least, to appear before the jury.

Further, in its brief the State indicated, "It was clearly in B.R.'s interests to assert his Fifth Amendment privilege against self-incrimination, where Petitioner was attempting to falsely blame him for the sex offenses perpetrated against Y.E." (Brief in Opposition to Petition for Writ of Certiorari at page 15.) Keeping in mind the State's cries that B.R. is innocent, how would it be in B.R.'s best interests to remain silent? Surely the State would not seek to prosecute B.R. when the State is certain he committed no crime.

III. King was not afforded the counsel guaranteed by the Sixth Amendment.

A. Counsel is ineffective when he failed to specifically object to the failure of the trial court to convene the Ohio Evidence Rule 807 hearing at least ten days prior to the trial.

The State's response to this issue is that trial counsel for King was made aware of the videotape in advance of trial. Therefore, there can be no ineffectiveness. This makes no sense.

The error was in not timely objecting to the problems created by the State when the State and the trial court refused to follow the proper procedure.

It is true that King, by and through his counsel, did not request a continuance. This is because the State and the trial court did not follow the proper procedures of Evidence Rule 807. Not having objected to these mandates, counsel failed

to protect King's constitutional rights to confront his accusers.

Likewise, these errors of the court were plain, and as such reversal is mandated.

B. Counsel is ineffective in trying a case when he could not hear.

The State claims that since there was additional defense counsel, that lead counsel was not ineffective when he could not hear large portions of the trial. This does not eviscerate the errors of trial counsel.

During preliminary remarks to the trial attorneys, the following discourse took place:

> "THE COURT: * * * Unless told differently, I will assume that the only attorneys who will make objections, when the other side is examining is Mr. Sheldon [for the State] and Mr. Paul [for King]." (Page 11 of the trial transcript.)

Only lead counsel, Mr. Paul, was permitted to raise objections. Not having done so due to his inability to hear, lead counsel prejudiced the rights of King. For example, lead counsel stated prior to delving into his cross-examination of Y.E.'s mother:

> "Q. * * * I have a hearing deficit, and many of the things you responded to questions I did not hear, but I did not want to interrupt what you were saying, so I just let it go, so please bear with me." (Page 104 of the trial transcript.)

The State cannot seriously claim that King was provided the counsel guaranteed to him by the Sixth Amendment.

C. The constitutional errors were not harmless.

In its final argument, the State claims that the constitutional errors alleged are harmless. In making this argument, the State makes two errors: first, the State cites this Court to the incorrect reviewing standard, and second, the State boldly proclaims that the DNA evidence is "conclusive."

First, any argument that the evidence would be merely cumulative is wholly unmeritorious. "In order to find constitutional error harmless, this court must find beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 828 , 17 L.Ed.2d 705, 710-711." *State v. Johnson*, 71 Ohio St. 3d 332, 339, 643 N.E.2d 1098, 1105 (1994). If the hearsay or other inadmissible evidence could have affected the verdict, then the error is not harmless. *Johnson, supra.*

Here, the errors consisted of the presentation to the jury of testimony which was clearly inadmissible hearsay not firmly rooted in any exception. The errors also consisted in B.R.'s being permitted to assert his Fifth Amendment privilege against testifying outside of the jury–not even giving the jury an opportunity to view him. Lastly, the errors consisted of an attorney trying a case without the ability to hear the proceedings. All of these errors go to the very root of the criminal justice system.

Second, the DNA results are not conclusive. In fact, there was a third party's DNA present in some of the sampling (or alternatively, the sample was contaminated). This would be consistent with the claim of King that he did not sexually assault or otherwise molest or rape Y.E. This would be consistent with a third party having done so--perhaps B.R.

Cellmark Laboratories' employee, Lisa Grossweiler, testified that there is a possible third person's DNA or possible contamination.

> "Q. But again, this 1.3 is in there, we are talking about this technical artifact, which you do admit could be a third person?
> A. Yes, second person."

(Page 405 of the trial transcript.)

As the earlier briefing indicated, B.R. was named as a potential third party. The State chose to totally ignore B.R., and in fact, to protect B.R. by aiding in his assertions of his Fifth Amendment rights and in also seeking and obtaining the protection of his alleged privileges with respect to his psychological records. Simply stated, the State did not want all of the facts to come out. What cannot be explained whatsoever is the fact that B.R. was never tested to see if perhaps it was his DNA. There is no Fifth Amendment privilege against testifying with respect to the taking of blood or other bodily fluid samples. B.R. has a background which is consistent with someone who would be a sexual offender. A psychologist was ready, willing and able to testify as to what B.R. had said to that psychologist relative to the sexual assaults. This same psychologist was ready, willing and able

to testify as to the statements made by B.R. as to the innocence of Kenneth King with respect to the sexual assaults.

Despite all of this, the State did not seek to test B.R. Suffice to say, the DNA results are not conclusive as claimed by the State.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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